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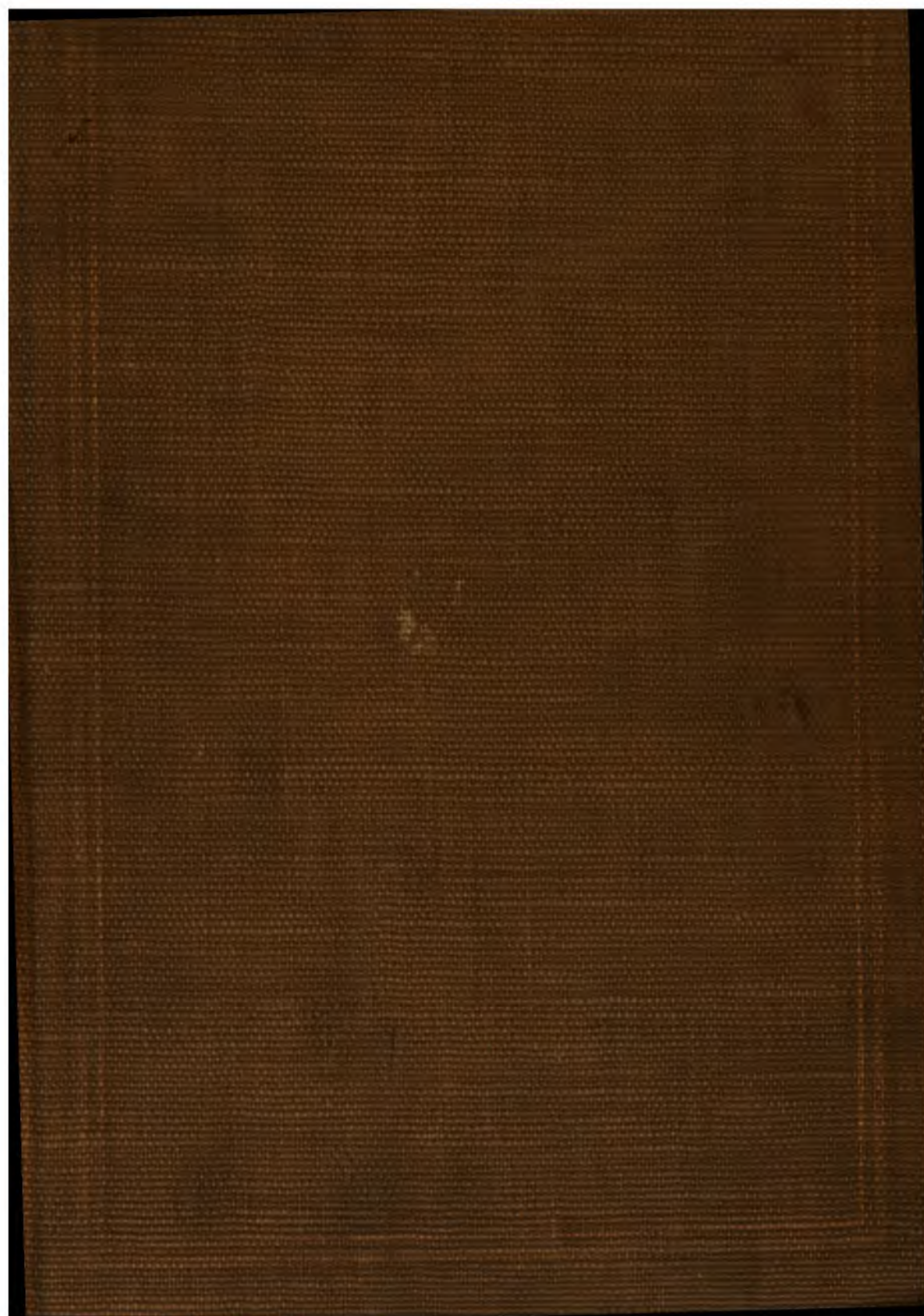
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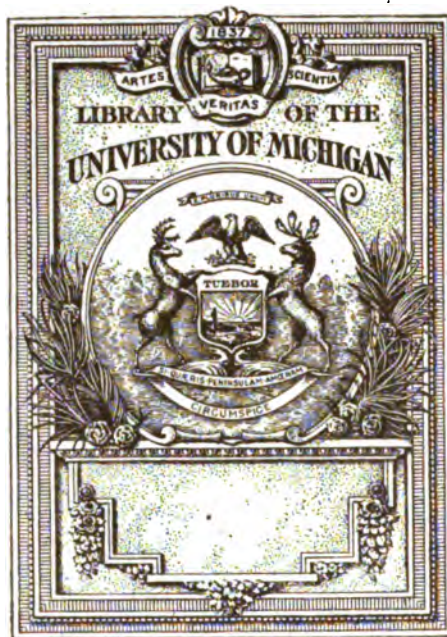
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THE GIFT OF
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A SELECTION OF CASES
ON
COMMERCIAL LAW

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PREFACE

These cases have been prepared for the use of students of commercial law and teachers of the subject. There is much to commend the judicious use of cases in teaching commercial law. It brings the students in contact with actual business affairs and the real problems of the law. Such a study not only fixes the principles of law in the mind, but it has a cultural, broadening influence which is of inestimable value. It also enlivens the subject, makes it real, and gives an added interest and enthusiasm to the work.

In recognition of the importance of contracts as the foundation of all commercial law, relatively more cases have been chosen on that subject. Other cases have been selected in accordance with the importance of the various subdivisions. There are relatively few cases in negotiable instruments. The decisions in this branch of the law are so conflicting that it is difficult to get a good line of decisions which would apply to all of the states. Most states have enacted the Uniform Negotiable Instruments Law, and this should form the basis of the work in this subject. If this statute is well considered, it will not be necessary to supplement it with many cases.

Real Estate law, though important, is hardly a part of commercial law. It is too technical to be presented satisfactorily in a beginning course. Very few cases have been chosen on the subject, as any extensive treatment should be deferred until the student has mastered the elementary principles.

An effort has been made to cover the entire field of law as presented in an elementary course. It is intended for use in High Schools, Colleges, Universities, and in all commercial schools where a beginning course in law is given.

A great number of teachers have expressed a desire for such a text and it is in response to this demand that the work has been prepared.

It is hoped that the book may prove beneficial to many teachers of the subject, and that its use may add a new stimulus to this very essential branch of commercial education.

Whitewater, Wisconsin
1917

J. C. R.

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CONTRACTS

ALL AGREEMENTS DO NOT CONSTITUTE CONTRACTS

KIRKSEY & KIRKSEY

8 Alabama, 131 (1845)

Assumpsit by the defendant, against the plaintiff in error.

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840 the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega County, some sixty or seventy miles off. On the 10th of October, 1840, he wrote to her the following letter:

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. . . . I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for \$200, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. (After stating his inclination to allow a recovery, proceeded): My brothers, however, think that the promise on the part

of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.

WHAT CONSTITUTES A SEAL?

WARREN V. LYNCH

5 Johnson, (New York) 239 (1819)

This was an action of assumpsit brought by the plaintiff, as the first endorser of a promissory note, against the defendant as maker. The note was as follows:

"Petersburg, Va., August 27, 1807.

"Four months after date I promise to pay Hopkins Robertson or order, the sum of \$719.121/2 cents, witness my hand and seal. Payable in New York.

"THOMAS LYNCH. (L.S.)"

The flourish and initials L. S. at the end of the maker's name constituted what was called his seal. The defendant pleaded non assumpsit, with notice of special matter to be given in evidence at the trial.

On this evidence the judge was of opinion that the plaintiff was entitled to recover, and under his direction the jury found a verdict for the plaintiff for the amount of the note with interest.

KENT, C. J., delivered the opinion of the Court. The two questions made upon this case are: 1. What is the legal import of the instrument upon which the suit is brought?

1. The note was given in Virginia, and by the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this State (4 Johns. Rep. 285). Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contra-distinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other States, of substituting a scrawl for a seal; and what was said by Livingston, J., in the case of *Meredith v. Hinsdale*, 2 Caines, 362, in favor of such a substitute, was his own opinion and not that of the Court. A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently

tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one if it want the requisite formalities. "Notwithstanding," says Perkins (Section 129), "that words obligatory are written on parchment or paper, and the obligor delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an escrowl, though the name of the obligor be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages, but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton and by Livingston, J. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. Seals were never introduced or tolerated in any code of law, because of any family impression or image or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practised upon the unwary. President Pendleton, in the case of *Jones and Temple v. Logwood*, 1 Wash. Rep. 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (Sec. 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors if every one put his seal upon the same piece of wax." And Brooke (tit. Faits, 30 and 17) uses the same language. In *Lightfoot and Butler's Case*, which was in the Exchequer, 29 Eliz. (2 Leon. 21). The Barons were equally explicit as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve

for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Selden's Notes to Fortescue (De Laud. p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject, for in the late case of *Adam v. Keer*, 1 Bos. & Puller, 360, it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses.

Rule refused.

CONTRACT MUST BE BASED ON AGREEMENT

SANDERS V. POTTITZER BROTHERS FRUIT COMPANY

144 New York, 209 (1894)

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made so as to become binding upon the parties. On October 28, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

"Buffalo, N. Y., October 28, 1891.

"Messrs. Pottlitzer Bros. Fruit Co., Lafayette, Ind.:

"Gentlemen: We offer you ten carloads of apples to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one half green fruit, balance red fruit, to be shipped as follows:

"First car between December 1 and 15, 1891.

"Second car between December 15 and 30, 1891, and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of \$2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars, this proposition to be accepted not later than the 31st inst., and you to pay us \$500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of \$100 per car on the last five cars.

"Yours respectfully,

"J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31, as follows:

"Lafayette, Ind., October 31.

"J. Sanders & Son:

"We accept your proposition on apples, provided you will change it to read car every eight days from January 1, none in December; wire acceptance.

"POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this despatch to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows:

"Can only accept condition as stated in last message. Only way we can accept. Answer if accepted: Mail contract and we will then forward draft.

"POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4, when the plaintiffs receiving the following letter from the defendant:

"Lafayette, Ind., November 2, 1891.

"J. Sanders & Son, Stafford, N. Y.:

"Gents: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and, therefore, we do not think it advisable to take the contract unless you made it read for shipment from

January 1. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same.

"POTTLITZER FRUIT CO."

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph:

"November 4.

"Pottlitzer Bros. Fruit Co., Lafayette, Ind.:

"Letter received. Will accept conditions. If satisfactory, answer and will forward Contract.

"J. SANDERS & SON."

The defendant replied to this message by telegraph, saying: "All right, send contract as stated in our message." The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence, and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end, and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition, but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally

assented to the modification and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and if they constituted a contract of themselves the absence of the formal agreement contemplated was not under the circumstances material. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provision not contemplated or embraced in the correspondence. (*Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun. 248; *Pratt v. H. R. R. Co.*, 21 N. Y. 308.) The principle that governs in such cases was clearly stated by Selden, J., in the case last cited in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which another party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case is this, can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if at the close of the correspondence the plaintiffs became bound by their offer, and the

defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of great confusion and uncertainty into the law of contracts. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except Earl, Gray, and Bartlett, JJ., dissenting.

Judgment reversed.

OFFER MUST BE ACCEPTED

PAYNE V. CAVE

King's Bench, 3 Term Reports, 148 (1789)

This was an action, tried at the Sittings after last Term at Guildhall before Lord Kenyon, wherein the declaration stated, that the plaintiff, on September 22, 1788, was possessed of a certain wormtub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf; the conditions of which sale were to be the usual conditions of sale of goods sold by auction, etc., of all which premises the defendant afterward, to wit, etc., had notice; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, etc., undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, etc. And the plaintiff avers, that the conditions of sale, hereinafter mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two day's time, it should be put up again and resold, etc., (stating all the conditions). It then stated that the defendant became the purchaser of the lot in question for £40, and was requested to pay the usual deposit, which he refused, etc. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one lot

at an auction; there were several bidders, of whom the defendant was the last who bid £40; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than £40; the defendant then asked him whether he would warrant it to weigh so much, and received an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for £30 to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding, he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of *Simon v. Metivier*, which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. . . . Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

MISTAKE AS TO THE PERSON WITH WHOM THE CONTRACT IS MADE

BOSTON ICE COMPANY V. POTTER

123 Mass. 28 (1877)

Contract on an account annexed for ice sold and delivered between April 1, 1874 and April 1, 1875. Answer, a general denial. Trial

without a jury. Judge ruled that plaintiff could not maintain this action. Exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt v. Nelson*, 1 Gray (Mass.) 536, 642; *Winchester v. Howard*, 97 Mass. 303; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303. If he had received notice and continued

to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*, 1 Allen (Mass.) 74; *Orcutt v. Nelson*, ubi supra; *Mitchell v. Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson*, 6 Taunt 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendant and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off, raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were not in existence.

Exceptions overruled.

MUTUAL MISTAKE PREVENTS THE FORMATION OF A CONTRACT

RUPLEY V. DAGGETT

74 Illinois, 351 (1874)

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied \$165, while the defendant testified that he said \$65, and that he did not understand him to say \$165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give \$65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the \$100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this, supposed the price was fixed, Rupley supposing it was \$65, and Daggett supposing it was \$165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendant appealed.

SCOTT, J., delivered the opinion of the Court.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On the way home with the mare in his posses-

sion, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

Judgment affirmed.

EFFECT OF UNCERTAINTY IN TERMS OF CONTRACT

SHERMAN V. KITSMILLER, ADMINISTRATOR

17 Sergeant & Rawle, (Penn.) 45 (1827)

DUNCAN, J. The declaration contains four counts:

1. On the special promise to give Elizabeth Koons one hundred acres of land, in consideration that she should live with the intestate, as his housekeeper, until her marriage, with an averment that she did live with him, and keep his house until her marriage.

2. That he would give her one hundred acres of land, if she lived with him until her marriage, and married the plaintiff, George Sherman, with averment that she did live with him until she intermarried with George Sherman.

3. Is a promise to give her one hundred acres of land, if she married George Sherman, with an averment that she intermarried with George Sherman.

4. Is a quantum meruit for work, labor, and services.

The error assigned is, in that part of a long charge in which the Court say, "There can be no recovery, unless there was a legal promise, seriously made; if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If George Sherman had reference to no particular lands, if he did not excite or intend to excite, a hope or expectation in Elizabeth

Koons, that after her marriage with George Sherman she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if George Sherman was seized of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance of such promise, she did marry George Sherman, then the action might be sustained."

Now, let us put the case of the plaintiffs in the most favorable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favorable to the plaintiffs than their case warranted. It should have been, on the question put to the court that the promise could not support the action; that the defendant's intestate did not assume to convey any certain thing, to convey any certain or particular land, or that could, with reference to anything said by him, refer to anything certain. Whereas the court submitted to the jury whether it did refer to anything certain, viz., lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. And if the verdict had been for the plaintiffs on either of these three counts, the judgment would have been reversed for this error. The jury have found that the promise referred to nothing certain, no particular lands anywhere of which the promisor was seized. Except the count on the quantum meruit, for the reasonable allowance for the services of Elizabeth Koons, it was not an action of indebitatus assumpsit, but an action on the special contract—an action to recover damages sustained by the plaintiff for the breach of a promise to convey one hundred acres of land, an action for not specifically executing the contract. There can be no implied promise, because, whatever the undertaking was as to the one hundred acres, it was express; the action is brought on the express promise, and that only lies where a man by express words assumes to do a certain thing. Com. Dig., title "Assumpsit upon an Express Promise," A. 3. Not that this means an absolute certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for, in assumpsit for non-payment of money, it is necessary to reduce the amount to a certainty; or, on a quantum meruit, by an averment, where the amount does not otherwise appear. Express promises or contracts ought to be certain and explicit, to a common intent

at least. 1 Com. on Cont. They may be rendered certain by a reference to something certain, and the cases to be found in the books as to the nature of this reference are generally on promises of marriage; as, where A, in consideration that B would marry his daughter, promised to give with her a child's portion, and that at the time of his death he would give to her as much as any of his other children, except his eldest son,—this was holden to be a good promise; for, although a child's portion is altogether uncertain, yet what the rest of the children, except the eldest, got, reduces it to a sufficient certainty. *Silvester's Case*, Popham, 148; 2 Roll. Rep. 104. But if a citizen of London promises a child's portion, that of itself is sufficiently certain; for, by the custom there, it is certain how much each child shall have. 2 Roll. Rep. 104; 1 Lev. 88. Now here, the court instructed the jury, that if they could find this promise to refer to anything certain, any land in particular, the action could be maintained. This was leaving it to the jury more favorably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. The contract was an express one,—nothing could be raised by implication,—no other contract could be implied. By the statute of frauds and perjuries, such a promise would be void in England, not being in writing; and, although that provision is not incorporated in our act on the subject, this would be matter of regret, if such loose speeches should be held to amount to a solemn binding promise, obliging the speaker to convey one hundred acres of his homestead estate, or pay the value in money. If a certain explicit, serious promise was made with her, though not in writing, if marriage was contracted on the faith of it, and the promise was certain of some certain thing, it would binding.

There would, in the present case, be no specific performance decreed in a court of chancery; the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him one hundred pieces of silver, this would be too vague to support an action; for what pieces?—fifty-cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to anything which could render it certain, does appear to me to be the most vague of all promises, and, if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountain, or in the Conestoga Manor—one hundred acres in the mountain of Hanover County, Virginia, or in

the Conewango rich lands of Adams County—one hundred acres of George Sherman's mansion-place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a quantum meruit for the value of this young woman's services until her marriage. If this promise had been that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular land; yet the party could recover back the money he had paid in an action. As, where a young man, at the request of his uncle, lived with him, and his uncle promised to do by him as his own child, and he lived and worked with him above eleven years; and his uncle said his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him as a compensation for his services, but died without doing anything for his nephew, or making him any compensation, it was held that an action on an implied assumpsit would lie against the executors for the work and labor performed by the nephew for the testator. *Jacobson v. The Executors of Le Grange*, 3 Johns. 199. In *Conrad v. Conrad's Administrators* (4 Dall. Pa. 130) a plantation was bought by the plaintiff, an illegitimate son of the defendant's intestate, on a special agreement that if the plaintiff would live with the intestate, and work his plantation for six years, he would give and convey to him one hundred acres of the land. This was held a good promise, because it was certain—one hundred acres of the plantation on which the father lived. But in this case the jury have negatived all idea of an agreement to give Miss Koons one hundred acres of any particular kind or quality of land, of any certain description, on which any value could be put. In 2 Yeats, 522, in an action on a promise to convey a tract of land in Northumberland County to the plaintiff, the promise was in the first instance gratuitous, but the plaintiff had paid the scrivener to draw the conveyance, which was held to be a sufficient consideration for the promise; the action was for damages for not conveying it. No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of anything by which the value could be regulated, anything to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal. The promise is as

boundless as the terrestrial globe. The party would lie at the mercy of the jury—there would be the same reason for ten thousand dollars damages as ten cents. The court could not set aside the verdict in any case, either on account of extravagance or smallness of damages, for there is nothing by which to measure them; but the arbitrary discretion or the caprice of the jury must decide them, without evidence and without control. It cannot be compared to actions of slander, where the jury have a wide range, and must exercise some latitude,—it is an action on an express promise, which the law says must be to perform something either certain to a common intent, or by reference to something which can render it certain. In contracts which can be enforced specifically, or where damages are to be given for their non-performance, there is always a measure of damages; in actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the direction of the jury. If the jury go beyond the standard, the value ascertained by evidence of the thing contracted for, or under its value, the court will set aside the verdict, but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court,—seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in assumpsit, trover, etc., where there is a measure, and personal torts, as false imprisonment, slander, malicious prosecution, where damages are matter of opinion. To say that nominal damages, at least, ought to be given, is taking for granted the very matter in controversy; for the legal question is, was there an actionable promise—a promise to do anything certain, or certain to a common intent, or where, by reference to anything, it would be rendered certain? The jury have negatived all this.

I am therefore of opinion that there was no error in the opinion of the court, by which the plaintiffs have been endamaged; that the law was laid down more favorably for them than the evidence warranted. Judgment affirmed.

WHERE IT IS AN OFFICER'S DUTY TO MAKE AN ARREST,
HE IS NOT ENTITLED TO EXTRA COMPENSATION

HOGAN V. STOPHLET

179 Ill. 150, 53 N. B. 604 (1899)

Action by Daniel Hogan, sheriff of Pulaski county, to recover the amount of a reward offered for the apprehension and conviction of a person who had committed a felony in his own county. Judgment in circuit court for plaintiff. Reversed by appellate court. Appeal.

MAGRUDER, J. It being true that it was the official duty of the appellant, as sheriff to make the arrest of the guilty party, and that the fees, which he is entitled to charge for the performance of his official duties, are fixed by law, it follows, upon well established principles, that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy and illegal for a sheriff to receive for services, for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty. (*Pool v. City of Boston*, 5 Cush. (Mass.) 219; *Murfree on Sheriffs*, p. 1070.) A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it.

In *Matter of Russell's Application*, 51 Conn. 577, the facts showed, that an inhabitant of the city of Hartford, whose house was broken into in the night, offered a reward for the detection of the burglar; that certain policemen, during the hours allotted them for rest, discovered the burglar, and obtained information which led to his conviction; that policemen in that city were required by law to report all violations of law, and to arrest without warrant persons guilty of criminal offenses where the offenders were taken in the act, or on the speedy information of others; to render all possible assistance to the ministers of the law, and to exert themselves to prevent the commission of crime, etc.; and it was held by the court that to allow them to receive the reward would be both in violation of the city ordinances, and against public policy. In that case the court said: "It has been held from a very early period, that a promise to pay an officer a sum of money for doing a thing, which the law will not suffer him to take anything for, is merely void, however freely and voluntarily it may appear to have been made. . . . And it is now well settled that a public officer, whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees in the form of a reward or in any other form, for services rendered in the line or scope of his official duties."

In *Pool v. City of Boston*, *supra*, it was held, that a watchman of the city of Boston, who, while in the discharge of his duty as such, discovered a person setting fire to a building and prosecuted him to conviction, was not entitled to claim a reward offered by the city government for the detection and conviction of the incendiary.

In *Davis v. Burns*, 5 Allen (Mass.) 349, it was held, that an officer of the customs of the United States, who found smuggled goods, while

assisting the inspectors in charge of a vessel and examining the passengers and their luggage, although he was not in discharge of the specific duty assigned to him, could not maintain an action to recover a reward offered by the owners of the vessel to any person giving information to their agents or officers of any goods smuggled or concealed or intended to be smuggled therefrom. In the latter case the decision of the court was put upon the broad ground of public policy which forbids an officer to receive extra compensation for doing what his official duty requires him to do. . . .

In *Lees v. Colgan*, 120 Cal. 262, where a captain of police of the city and county of San Francisco apprehended a murderer in such city and county for a murder committed in another county, it was held that the captain made the arrest of the murderer in the line of his official duty and that it was against sound public policy to receive a reward offered by the government of the state for the arrest and conviction of the murderer; and in that case the courts say; "That courts, both in this country and in England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty." (See also, *Marking v. Needy & Hatch*, 8 Busch. (Ky.) 22; *Ex parte Gore*, 57 Miss. 251; *Monroe County v. Bell*, 18 So. 121; *Thornton v. Railway Co.* 42 Mo. App. 58; *Kick v. Merry*, 23 Mo. 74; *Weaver v. Whitney*, 1. Hopk. 13; *Hatch v. Mann*, 15 Wend. (N. Y.) 45.)

The claim that extra services have been rendered, furnishes no warrant in such cases for the charge of extra compensation. In *Hatch v. Mann*, *supra*, it was said: "That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretense, that it is for extra services, would cover any conceivable corruption or extortion. . . . If a constable for making extraordinary efforts to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might, and soon would, put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject."

There are some decisions which hold to the contrary of the views herein expressed, but these decisions will be found upon examination to be cases where the officer arrested the offender beyond his territorial jurisdiction, or cases arising under particular statutes, which did not

make it the duty of the officer to make the arrest. Many of these decisions are reviewed in the very able opinion delivered by the Supreme Court of Connecticut in the matter of Russell's Application, *supra*, and are there distinguished from such cases, as that which is presented by the present record.

The principles, announced by the authorities above referred to, have always been recognized as sound by this court.

Judgment of appellate court affirmed.

WHERE IT IS NOT THE DUTY OF AN OFFICER TO PERFORM
AN ACT, HE IS ENTITLED TO A REWARD OFFERED
GENERALLY TO ANY ONE WHO WOULD DO IT

REIF V. PAIGE

55 *Wisconsin*, 496 (1882)

During the afternoon of December 3, 1880, a hotel in the city of Oshkosh, known as the "Beckwith House," was destroyed by fire. The defendant and his wife lived in this hotel, occupying rooms in the fourth story. When the fire broke out Mrs. Paige was in those rooms and perished in the flames. The members of the Fire Department of Oshkosh placed a ladder at a window near where Mrs. Paige was supposed to be, and at least two firemen attempted to enter the window and rescue her, but were driven back by the smoke and flames. The ladder was then removed, but subsequently was replaced at the same window. About this time, and after the fire had been raging thirty minutes or more, the defendant, who had been absent, reached the scene of the fire, and, as it is alleged in the complaint, offered and promised to pay a reward of \$5000 to any person who would rescue his wife from the burning building, dead or alive. The plaintiff claims that he has earned the reward thus offered, and has brought this action to recover the same.

The complaint alleges that the plaintiff, on being informed of such offer and promise and confiding in and relying upon the same, entered such rooms in the fourth story of the burning building, at great peril to his life and health, removed therefrom the dead body of Mrs. Paige, and delivered the same to the defendant. Also that the plaintiff has performed all of the conditions of said contract on his part to be performed; that no part of the said \$5,000 has been paid to him, and that the same is now due and payable.

In his answer the defendant denies that he offered any reward for the rescue of his wife from the burning building and also denies an averment in the complaint that the Fire Department was unable to re-

move her therefrom. He alleges therein that the body of his wife was recovered by members of that department; that the plaintiff was an assistant engineer and a paid officer in that department, and whatever he did in the recovery and removal of the body of Mrs. Paige was done as such officer and member of the Fire Department, and in the performance of his duties as such.

The testimony on the trial tended to prove that the defendant offered the reward, and that with knowledge of the offer and on the faith of it, and for the purpose of earning the reward, the plaintiff ascended the ladder, entered the building, and rescued the dead body of Mrs. Paige from the flames, to the knowledge of the defendant.

LYON, J. The learned circuit judge nonsuited the plaintiff on the ground that it was his duty as a paid officer and member of the Fire Department of Oshkosh to rescue persons as well as property from fires and that it is against sound public policy to allow him to contract for a reward for recovering the body of Mrs. Paige. Also that in such a case there is no valid consideration for the offer, moving from one whose duty it is to do the act. Counsel for the plaintiff concedes that if it was the duty of his client as fireman to go into the burning building and remove therefrom the remains of Mrs. Paige, he cannot recover the reward, but contends that it was not his duty to do so under the circumstances of the case. Counsel for the defendant, while not contending that it was the duty of the plaintiff as a fireman to imperil his life by going into the building for Mrs. Paige, or that the act was not a very perilous one, maintains that it was in the nature of extra or extra hazardous services in the line or scope of his duty, and, being so, the law will not permit him to contract for a reward for doing the act.

There was considerable discussion by counsel as to what are the duties of firemen. We know of no guide for ascertaining those duties other than the charter of the municipality in which they are employed, and the ordinances or by-laws enacted pursuant thereto. The ordinances of the city of Oshkosh in respect to its Fire Department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon these, for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Paige from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can be no doubt from the testimony. He did not, as does a soldier, contract to risk his life in the service. The most that can reasonably be claimed is that, short of risking his life, he contracted to use his best judgment and efforts in extinguishing fires, and in saving persons and property from destruction or injury.

But it is quite doubtful whether a fireman employed under the charter and ordinances of Oshkosh owes any duty, as a fireman, to rescue persons from burning buildings. Both charter and ordinances are silent on the subject, although an ordinance requires them to aid in the removal of endangered goods and property. It may well be that for the rescue of persons in peril from a conflagration the Legislature or Common Council relied upon the promptings of humanity which in such emergencies always insure the utmost efforts of all who can aid therein, whether fireman or not, to save the lives of those in peril. But whether a fireman owes any such duty by reason of his employment is not here determined. We assume, for the purposes of this case, that he does, and have stated above the limits of that duty, if it exists.

On this hypothesis, the precise question to be determined is whether the fact that it was not, under the circumstances, the duty of plaintiff as a fireman to rescue the body of Mrs. Paige, renders him competent to make a valid contract for a reward for so doing. It is difficult to perceive how it can properly be said that it was within the scope or line of the plaintiff's duty to do the act, when it was not his duty to do it. It is conceded, for the purposes of the case, that it was his duty as a fireman to rescue Mrs. Paige from the flames if he could do so without hazarding his own life. It was not his duty to do so at the hazard of his life. Can it properly be said that it was in the line or scope of his duty to rescue her at the imminent peril of losing his life, when his duty did not require him to do so? We confess our inability to perceive any satisfactory grounds upon which this question may be answered affirmatively.

In the law of agency we find that principals are often held responsible for the unauthorized acts of their agents because such acts are within the scope of the authority of such agents, although not within their actual authority. The principal is held in such a case because he has clothed his agent with apparent authority to do the act, and a person to whom the agent is accredited may deal with him on the faith that he has the authority to bind his principal which he appears to have, and may hold the principal as effectually as though the agent had actual authority in the premises. Hence, when it is said that a given act of an agent, although unauthorized, is within the scope of his authority, and therefore binds his principal, it only signifies that the principal has apparently given his agent authority to do the act, and, as against a person dealing with the agent in good faith, he shall not be heard to deny the agent's authority.

But where the question is one of duty, there seems to be no room for the application of any such principle. If it is not the duty of a per-

son to render a specified service, we fail to comprehend how it can correctly be said that the service is within the line or scope of his duty—that is to say, that although it is not actually his duty to render the service, yet, because it is his apparent duty to do so, he shall be held to the same consequences as though it were his actual duty. It seems to us that the mere statement of the proposition is sufficient to show that it is untenable.

It follows, from the views above expressed, that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the Fire Department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue.

The judgment of nonsuit must be reversed, and the cause will be remanded for a new trial.

DISTINCTION BETWEEN A BUSINESS CIRCULAR AND AN OFFER TO SELL

MOULTON v. KERSHAW

59 Wisconsin, 316 (1884)

The case is thus stated by Taylor, J.:

"The complaint alleges that the defendants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the plaintiff was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the defendant; that on September 19, 1882, the defendants, at Milwaukee, wrote and posted to the plaintiff at La Crosse a letter of which the following is a copy:

" 'Milwaukee, September 19, 1882.

" 'J. H. Moulton, Esq., La Crosse, Wis.:

" 'Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city, at 85 cents per barrel, to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

" 'Yours truly,

" 'C. J. KERSHAW & SON.'

"The balance of the complaint reads as follows: 'And this plaintiff alleges, upon information and belief, that said defendants did not send

said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to wit, on September 20, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of 2,000 barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows:

“ ‘La Crosse, September 20, 1882.

“ ‘To C. J. Kershaw & Son, Milwaukee, Wis. :

“ ‘Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer.
J. H. MOULTON.

“ ‘That said telegraphic acceptance and order was duly received by said defendants on September 20, 1882, aforesaid; that 2,000 barrels of said salt was a reasonable quantity for this plaintiff to order in response to said offer, and not in excess of the amount which the defendants, from their knowledge of the business of the plaintiff, might reasonably expect him to order in response thereto.

“ ‘That although said defendants received said acceptance and order of this plaintiff on said September 20, 1882, they attempted, on September 21, 1882, to withdraw the offer contained in their said letter of September 19, 1882, and did, on said September 21, 1882, notify this plaintiff of the withdrawal of said offer on their part; that this plaintiff thereupon demanded of the defendants the delivery to him of 2,000 barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said offer on their part; that this plaintiff thereupon demanded of the defendants the delivery to him of 2,000 barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said terms, and this plaintiff was ready to accept said 2000 barrels, and ready to pay therefor in accordance with said terms. Nevertheless, the defendants utterly refused to deliver the same, or any part thereof, by reason whereof this plaintiff sustained damage to the amount of \$800.

“ ‘Wherefore the plaintiff demands judgment against the defendants for the sum of \$800, with interest from September 21, 1882, besides the costs of this action.’

“ ‘To this complaint the defendants interposed a general demurrer. The Circuit Court overruled the demurrer and from the order overruling the same the defendants appeal to this court.’”

TAYLOR, J. The only question presented is whether the appellants' letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. . . .

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one carload. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help

out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one carload. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might expect him to order.

The cases cited by the learned counsel for the appellants (*Beaupre P. & A. Tel. Co.*, 21 Minn. 155, and *Kinghorne v. Montreal Tel. Co.*, U. C. 18 Q. B. 60) are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language, proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By The Court. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

WHERE A BUYER HAS ACCEPTED PROPERTY BEFORE, HE
MUST COMMUNICATE HIS REFUSAL TO ACCEPT
A SHIPMENT

HOBBS V. MASSASOIT WHIP COMPANY

158 Mass. 194 (1893)

Contract, upon an account annexed for one hundred and eight dollars and fifty cents, for 2,350 eelskins sold by the plaintiff to the defend-

ant. At the trial in the Superior Court, before Hammond, J., it appeared in evidence that the plaintiff lived in Saugus, and the defendant had its usual place of business in Westfield, and was engaged in the manufacture of whips.

The plaintiff testified that he delivered the skins in question to one Harding of Lynn, on February 18, 1890, who upon the same or the following day forwarded them to the defendant; that the skins were in good condition when received by Harding, 2,050 of them being over twenty-seven inches in length each, and the balance over twenty-two inches in length each; that he had forwarded eelskins to the defendant through said Harding several different times in 1888 and 1889, and received payment therefor from the defendant; that he knew the defendant used such skins in its business in the manufacture of whips; that the skins sent on February 18, 1890, were for such use; that he understood that all skins sent by him were to be in good condition and over twenty-two inches in length, and that the defendant had never ordered of him skins less than twenty-two inches in length; and that Harding took charge of the skins for him and that he received orders through Harding, but that Harding was not his agent.

Harding, who was called as a witness, testified that he had some correspondence for the plaintiff with the defendant in reference to skins; that he acted for the plaintiff in forwarding skins to the defendant, and in receiving pay therefor, and acting for the plaintiff in giving him any information, order, or notice which he received from the defendant in reference to skins sent or to be sent.

The defendant contended that Harding acted as the plaintiff's agent. The plaintiff contended that Harding acted as the agent of the defendant, and not as his agent. On this point the evidence was conflicting, and the question was submitted to the jury, upon instructions not excepted to.

Four letters were offered in evidence, three of which, dated in 1889, showed transactions between the plaintiff and the defendant, and the fourth of which, dated Lynn, February 18, 1890, signed by Harding and addressed to the defendant, was as follows: "We send you to-day, for Mr. Hobbs, 2,050 eelskins at .05 and 300 at .02."

One Pirnie, president of the defendant corporation, called by the defendant, testified that before February 18, 1890, the plaintiff had sent eelskins four or five times by Harding to the defendant, which were received and paid for by the defendant; that the defendant agreed to pay five cents each for eelskins over twenty-seven inches in length, and two cents each for eelskins over twenty-two inches in length and less than twenty-seven inches, suitable for use in the defendant's busi-

ness; that Harding was not acting for the defendant, but for the plaintiff; that the defendant never ordered the skins in question, and did not purchase them in any manner, and that no officer or employe of the corporation except himself had authority to order or purchase skins, and that he never ordered or purchased those in question; that skins came from Hobbs through Harding on February 19 or 20, 1890, and were at once examined by him, and found to be less than twenty-two inches in length, and found to be unfit for use, and that he notified Harding at once, in writing, that the skins were unfit for use, and that they were held subject to the plaintiff's order; that the skins remained some months at the defendant's place of business in Westfield, and were then destroyed; and that the defendant received no other skins in the month of February from the plaintiff or from any other person.

One Case, the defendant's shipping clerk, and one Gowdy, the defendant's treasurer, testified that the skins sent on February 18, 1890, and received February 19 or 20, 1890, were examined by them, and were very short, in very bad shape, not fit for use, and worthless.

The judge instructed the jury that the plaintiff could not recover for eelskins less than twenty-two inches in length, nor for any of the eelskins if they were in the condition described by the witnesses for the defendant.

The plaintiff denied that he received any notice from the defendant that the skins were not suitable for use, or that they were held subject to h's order.

The judge, among other instructions, also gave the following: "Whether there was any prior contract or not, if skins are sent to them (the defendants) and they see fit, whether they have agreed to take them or not, to lie back and say nothing, having reason to suppose that the man who has sent them believes that they are taking them, since they say nothing about it, then, if they fail to notify, you would be warranted in finding for the plaintiff, on that state of things."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about

it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushel v. Wheeler*, 15 Q. B. 442; *Benjamin on Sales*, P. 162-164; *Taylor v. Dexter Engine Co.*, 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. *O'Donnell v. Clinton*, 145 Mass. 461, 463; *McCarthy v. Boston & Lowell Railroad*, 148 Mass. 550, 552.

Exceptions overruled.

EFFECT OF IGNORANCE OF OFFERED ACT

BARTHOLOMEW V. JACKSON

20 *Johnson* (N. Y.) 28 (1822)

In error, on certiorari to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded non assumpsit. It appeared in evidence, that Jackson owned a wheat stubble-

field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by 10 o'clock the next morning. J. waited until that hour, and then set fire to the stubble, in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J. finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B., and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a certiorari on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.

IMPLIED PROMISE FROM CONDUCT OF PARTIES

DAY V. CATON

119 Mass. 513 (1876)

Contract to recover the value of one half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before Allen, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one half of it in the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point.

The defendant requested the judge to rule that,

"1. The plaintiff can recover in this case only upon an express agreement.

"2. If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

The jury found for the plaintiff, and the defendant alleged exceptions.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. *Chit. Con.*(11th Am.ed.)86. *Wells v. Banister*, 4 Mass. 514; *Knowlton v. Plantation No. 4.*, 14 Maine, 20; *Davis v. School District in Bradford*, 24 Maine, 349.

The plaintiff, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft v. Dickinson*, 6 Allen, 553. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option

to avail himself of them, justify this inference. *Abbot v. Hermon*, 7 Greenl. 118; *Hayden v. Madison*, 7 Greenl. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterward in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb v. Bunce*, 4 M. & S. 275; *Conner v. Hackley*, 2 Met. 613; *Preston v. American Linen Co.*, ante, 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

NECESSITY OF THE COMMUNICATION OF AN ACCEPTANCE

WHITE V. CORLIES

46 *New York*, 467 (1871)

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract. The plaintiff

was a builder. The defendants were merchants. In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suite of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work. On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions. On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate which he assented to by signing the same and returning it to the defendants. On the day following, the defendants' book-keeper wrote the plaintiff the following note:

"New York, September 29.

"Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

"The writer will call again, probably between five and six this P.M.

"W. H. R.,

"For J. W. Corlies & Co., 32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon. And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent) before commencing the work? In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties." To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any like other work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but Allen, J., not voting.

Judgment reversed, and new trial ordered.

MUST THE REVOCATION BE COMMUNICATED?

COLEMAN V. APPLEGARTH

68 Maryland, 21 (1887)

ALVEY, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus:

"For and in consideration of the sum of five dollars paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground rent therein mentioned, at and for the sum of \$645 cash, at any time on or before the first day of November, 1886."

It was dated the 3d of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the 1st of December, 1886. It is further alleged that; about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of \$700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the \$645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter

denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that, as a general proposition, time is not deemed by courts of equity as being of the essence of contracts; and that, in perfected contracts, ordinarily, the fact that the time for performance has passed will not be regarded as a reason for withholding specific execution. But while this is the general rule upon the subject, that general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time. 2 Story's Eq. Jur. sec. 776. Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court, made in respect to an optional contract to purchase, in the case of *Maughlin v. Perry*, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plain-

tiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged and shown that before the expiration of such time, the defendant Applegarth verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886, and that it was within this latter or extended period and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere nudum pactum, and therefore not enforceable, to say nothing of the statute of frauds, which has been invoked by the defendants. After the 1st of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff. Pomeroy on Specific Performance, secs. 60, 61.

The principles that govern in cases like the present are very fully and clearly stated by the English Court of appeal in chancery in the case of *Dickinson v. Dodds*, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock, A. M.," two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed a price, Lord Justice James said:

"There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise and could not in any way with-

draw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law, on one of the clearest principles of law, that this promise being a mere nudum pactum, was not binding, and that at any moment before complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said:

"He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him until Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds."

And further on he says:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when one of the persons to whom

the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.

REASONABLE TIME IN ACCEPTING OFFER

MACLAY V. HARVEY

90 Illinois, 525 (1878)

SCHOLFIELD, J., delivered the opinion of the Court.

Appellant brought assumpsit against appellee, in the Court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this state, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor \$15 per week.

The judgment was in favor of appellee and appellant now assigns numerous errors as grounds for its reversal.

In our opinion the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following, by mail:

"Monmouth, Ill., March 9, 1876.

"Miss L. Maclay, Peoria, Ill:

"I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my

stock this season, and if we can agree I would want you for a permanent trimmer.

"Please notify me by return mail, and terms, and we can confer further.

"Yours in haste,

"JOHN HARVEY.

"Formerly Jno. Harvey & Co., when you trimmed for me."

Appellant's reply to this is not before us. She says she stated her terms in it, and thereafter appellee wrote her the following, which she also received by mail:

"Monmouth, Ill., March 21, 1876.

"Miss L. Maclay, Peoria, Ill.:

"Your favor was received in due time, and contents noted. You spoke of wages at \$15 per week and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days.

"I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth, and pay you the above wages for your actual time here in the house at that rate per season.

I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail.

"Yours,

"JOHN HARVEY."

Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee, at Monmouth, as follows:

"Peoria, Ill., March 23.

"Mr. Harvey:

"Yours was promptly received, and I will go to Chicago next week, and when my services are required you will let me know.

"Very respectfully,

"L. MACLAY."

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until March 25.

Appellee receiving no reply from appellant on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received appellant's postal card, which had come to the office there during his absence. On Wednesday night, of the same week, appellee left Monmouth for Chicago, arriving at the last-named place on the following morning, Thursday, March 30. Finding that appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact; but this letter, in consequence of appellant's absence from Peoria, she did not receive for sometime afterward.

The millinery season commences from April 5 to 10, and ends from June 20 to July 4, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of March 30. Appellant says she left Peoria for Chicago on Friday, which must have been March 31. On arriving at Chicago, she went to Wetherell's, and, failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on April 8, she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on March 25. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. *Hough v. Brown*, 19 N. Y. (5 Smith) 111.

It was said by the Lord Chancellor, in *Dunlop v. Higgins*, first House of Lord's cases, at page 387: "Where an individual makes an offer by post, stipulating for, by the nature of the business having the right to expect an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is re-

leased from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here, that the nature of the business demanded a prompt answer, and the words "you will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by return mail. *Taylor v. Rennie et al.*, 35 Barb. 272.

The evidence shows that there were two daily mails between Peoria and Monmouth—one arriving at Monmouth at 11 o'clock a. m. and the other at 6 o'clock p. m., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offer, it will be remembered, bears date March 21. Assuming the date of appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23rd, which he ought to have received on that day, or at the farthest by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23rd, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence.

The question of whether it would not have equally well subserved appellee's object had he treated the postal card of appellant as the consummation of a contract, is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led, by the postal card of appellant, to believe that he

would, when he arrived at Chicago on Thursday, find her either at Wetherell's or Keith Brothers. Had he done so, it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros. as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot, therefore, be held estopped from denying that it was not posted in time. In view of the lateness of the season, and the danger to appellee's business from delay, of all which appellant is aware, it cannot be said appellee acted with undue haste in engaging another milliner.

The judgment is affirmed.

Judgment affirmed.

DICKEY, J., dissenting:

I cannot concur in this decision. I think the special contract was made and assented to by both parties. I concede that the delay of Miss Maclay in mailing her postal card was such that the mere mailing of it on Saturday, March 25, did not bind Harvey or consummate a contract. I agree that on Monday evening (the 27th) when he received that card, he had, at that time, the right, by law, to reject it, because it came too late, but, in my judgment, he waived that right. In the language of the governing opinion, appellee was "under no obligation to regard the contract as closed. He might, it is true, have done so,—that is, he might have "treated the postal card as the consummation of a contract."

The point on which I differ from my brethren is this: I think the evidence tends to show that he did, in fact, waive the delay; that he did in fact, treat, "the postal card as the consummation of a contract;" that he did "regard the contract as closed." He received on Monday evening her acceptance of his offer, with a statement, dated on the Thursday previous, that she would (in pursuance of the supposed contract) "go up to Chicago next week." If he intended to avail himself of her delay in sending her answer, and for that cause refuse to treat the contract as closed, it was his duty to notify her at once of his intention to do so. He remained silent three whole days, and permitted her to make her journey to Chicago on the faith of the supposed contract. Even had Harvey not intended to treat this as a contract consummated, his neglect to so notify her ought to estop him from saying that he did not waive all objection on account of her delay in answering.

It is true, one cannot, on his own mere motion impose upon another, without his consent, the duty of rejecting an offer. In such case, the failure to reject an offer must not be held to be an acceptance. But in this case, special relations, as negotiators, had been established between these parties, at the instance of Harvey. The surroundings were such that common honesty demanded of him that he should notify her at once if he intended to object to her acceptance of his offer on the ground that it came too late. Not only was he silent, but he did, affirmatively, treat the contract as consummated. He started to Chicago on Wednesday evening, two days after he received her postal card, as he testifies, "expecting to find Miss Maclay in Chicago," and intending to confer with her about the business which was the subject of the contract. The expectation that he would meet her in Chicago was founded on the fact that he supposed she regarded the contract complete, and that she would, in pursuance thereof, be in Chicago.

A contract consists in the meeting of two minds at the same time on the same terms, and so made manifest to each. The proof tends to show, that on Wednesday, when Harvey started to Chicago, he regarded the contract as closed, and that at that time Miss Maclay, also at Peoria, regarded the contract as made and complete; and it also plainly shows, that Miss Maclay understood that Harvey was consenting thereto, and at the same time Harvey well understood that she was consenting thereto. He thought he had hired a trimmer—she thought she had contracted for employment as such.

Had Harvey found Miss Maclay at Chicago, and had she there at once refused to perform the contract, and had she thereby compelled him, at increased expense, to hire another trimmer, Harvey could, doubtless, have had an action against her for a breach of the contract. If she were bound, he ought also to be held bound by this contract.

It is suggested, that the failure of Miss Maclay to be found in Chicago on Thursday, in some way gave Harvey the right to cease treating this contract as closed. It is true, as a matter of fact, that Harvey expected Miss Maclay would be in Chicago on Thursday, preparing to execute the contract. It was no fault of hers that she was not there on that day. She had written the week previous, saying, "I will go up to Chicago next week." She kept her promise. She arrived at Chicago on Friday, March 31. She had no intimation that Harvey expected to meet her there, or intended to go there at all. She was under no obligation to be there before Friday, and I cannot perceive how that fact can operate to release Harvey from what I regard as a binding contract.

UNACCEPTED OFFER MAY BE WITHDRAWN

SHUEY V. UNITED STATES

92 United States, 73 (1875)

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of \$15,000, being the balance alleged to be due him of the reward of \$25,000 offered by the Secretary of War, on April 20, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The Court below found the facts as follows:

1. On April 20, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," \$25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On November 24, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was zouave in the military service of the Papal Government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American Minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American Minister, over Surratt. Thereupon certain diplomatic correspondence passed between the Government of the United States and the Papal Government relative to the arrest of and extradition of Surratt; and on November 6, 1866, the Papal Government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal Government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American Minister at Rome, being informed of the escape by the Papal

Government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American Government to the United States; but the American Minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American Minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American Minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the Act of July 27, 1868 (15 Stat. 234, §3), the sum of \$10,000. Such payment was made by a draft on the Treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the Act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly, whereupon an appeal was taken to this Court.

Ste. Marie having died "pendente lite," his executor was substituted in his stead.

STRONG, J., delivered the opinion of the Court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H Surratt, for which the War Department had offered a reward of \$25,000 but, giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of \$25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between

the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest if any persons were. We think, therefore, that at most the claimant was entitled to the “liberal reward” promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on November 24, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made. Judgment affirmed.

AN AGREEMENT TO KEEP AN OFFER OPEN FOR A CERTAIN LENGTH OF TIME REQUIRES A CONSIDERATION

DICKINSON v. DODDS

L. R. 2 Chancery Division, 463

On Wednesday, June 10, 1874, the defendant, John Dodds, signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows:

“I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

“£800.

(Signed) JOHN DODDS.”

"P. S.—This offer to be left over until Friday, 9 o'clock A. M. J. D. (the twelfth), 12th June, 1874. (Signed) "JOHN DODDS."

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 a.m., within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the plaintiff, in fact, determined to accept the offer on the morning of Thursday, June 11, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 a.m., on the Friday.

In the afternoon of Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess, this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have so'd the property."

It appeared that on the day before, Thursday, June 11, Dodds had signed a formal contract for the sale of the property to the defendant Allan for £800, and had received from him a deposit £40.

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of June 10, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for the damages.

The cause came on for hearing before Vice-Chancellor Bacon on January 25, 1876, who rendered a decree of specific performance. From this decision both the defendants appealed. . . .

JAMES, L. J., after referring to the document of June 10, 1874, continued:

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock a.m., June 12, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time—that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to

watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had, in fact, agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L. J. I am of the same opinion. The first question is, whether this document of June 10, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "this offer to be left over until Friday, 9 o'clock a.m." Well, then, this being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not

prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time—(that is, at the time of the acceptance)—how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person, to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the

property has been sold to some one else, it is too late for him to accept the offer and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J. A. I entirely concur in the judgments which have been pronounced.

OFFER CREATES NO LEGAL RIGHTS UNTIL ACCEPTANCE,
BUT MAY LAPSE OR BE REVOKED

PRATT V. TRUSTEES
93 *Illinois*, 475 (1879)

Action on notes. Plaintiff had judgment below.

SCHOLFIELD, J. Appellees obtained judgment in the county court of Kane County against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes, executed by the deceased to the appellees on the 6th of July, 1871,—one for \$300, payable one year after date, and the other for the sum of \$327.50, payable two years after date, and both bearing interest at the rate of ten per cent per annum. Appeal was taken from that judgment to the Circuit Court of Kane County, where the cause was again tried at its October term, 1876, resulting, as before, in a judgment in favor of appellees for the amount of the notes, principal and interest. Mary L. Pratt, administratrix, appeals from that judgment, and brings the rulings of the Circuit Court before us for review.

The defense interposed to the notes is, that they were executed without any valid consideration. . . .

The question to be considered is, did Pratt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell; and when the notes matured, at Pratt's suggestion to let them stand, because as, he alleged, bell metal was getting cheaper, and they would thereby be enabled to

procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees nor the church which they represent to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon these notes, before the death of Pratt. It is shown that the bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with a reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's life-time, the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. *Pope v. Dodson*, 58 Ill. 360; *Blanchard v. Williamson*, 70 Id. 652. Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred, which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. 1 Pars, on Bills and Notes, 202; 1 Pars, on Cont. 377, et seq.

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. *Hulse v. Hulse*, 17 C. B. 711; 84 Eng. Com. Law, 709.

In the absence of any one claiming rights as a bona fide assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so much in aid of a church, school, etc., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure v. Wilson*, 43 Ill. 356, and cases there cited; *Trustees v. Garvey*, 53 Id. 401; S. C. 5 Am. Rep. 51; *Baptist Education Soc. v. Carter*, 72 Id. 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Ob-

vously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of *Companari v. Woodburn* (15 C.B. 400; 80 Eng. Com. Law, 400) is directly in point, and held that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him 100 pounds; that he did endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay 100 pounds. The count was held not to show a cause of action. Jervis, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. A fortiori the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is *Michigan State Bank v. Leavenworth* (2 Williams (Vt.), 209), where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of the opinion, on the record before us, the judgment below was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.

AN OFFER ONCE REFUSED CANNOT BE SUBSEQUENTLY
ACCEPTED WITHOUT THE CONSENT OF THE
PARTY MAKING THE OFFER

HYDE V. WRENCH
3 Beavan, 334 (1840)

This case came on upon general demurrer to a bill for specific performance, which stated to the effect following:

The defendant being desirous of disposing of an estate, offered, by

his agent, to sell it to the plaintiff for £1200, which the plaintiff, by his agent, declined; and on June 6, the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me £1200 for my farm; I will only make one more offer, which I shall not alter from—that is, £1000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

On June 11, the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and the instant I receive his reply will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterward promised he would give an answer about accepting the £950 for the purchase on June 26, and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on June 29, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt of your letter of the 27th instant informing me that you are not disposed to accept the sum of £950 for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm—viz., £1,000 through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated that the defendant "returned a verbal answer to the last-mentioned letter, to the effect, he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Master of the Rolls. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the

defendant. I think that it was not afterward competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

WITHDRAWAL OF AN OFFER BY LETTER IS NOT
EFFECTIVE UNTIL RECEIVED

BYRNE & COMPANY V. VAN TIENHOVEN & COMPANY

5 Common Pleas Division 344, (1880)

LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1,000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on October 1, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on October 11 and 15, respectively. These letters and telegrams were as follows: (The learned judge read the letter of October 1, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1,000 boxes of this brand 14 x 20 at 15s. 6d. per box f. o. b. here with 1 per cent for our commissions; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The answer was a telegram from the plaintiffs to the defendants sent on October 11, 1879: "Accept thousand Hensols." On October 15, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st. inst., which we had on Saturday p.m., and immediately cabled acceptance of the 1,000 boxes 'Hensol,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13, on Messrs. A. R. McMaster & Brothers, London, for £1,000. . . . Will thank you to ship the 1,000 'Hensols' without delay.") These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writings within the Statute of Frauds, and that

they contracted only as agents; but these contentions were very properly abandoned as untenable and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of October 1, was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On October 8, the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about 25 per cent, we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of October 8, reached the plaintiffs on October 20. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. (The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and in fact a contract for 1,000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled 'offer withdrawn' you would have protected yourselves and us too. We disposed of the 1,000 boxes on the 17th at a net profit of \$1,850. . . . We write our friend Phillip S. Phillips, Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1,000 boxes Hensol at 17s. 6d. The only firm offer we received from you under date of October 1st was 1,000 boxes at 15s. 6d., and 10 per cent f. o. b. Cardiff; we cable you to-night 'demand shipment'." This letter is followed by one from the defendants to the plaintiffs of October 25th, refusing to complete. (The learned judge read it. The defendants acknowledged the receipt of the cable message of the 20th, enclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst., we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such.")

There is no doubt that an offer can be withdrawn before it is ac-

cepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not—*Routledge v. Grant*. For the decision of the present case, however, it is necessary to consider two other questions, viz.: (1) Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? (2) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. See *Tayloe v. Merchants' Fire Insurance Co.* cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, 2d ed., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question—viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on October 1, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris's Case*, *Dunlop v. Higgins*), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer

by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of October 8 is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on October 8 of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

Judgment for plaintiffs.

TIME WITHIN WHICH AN OFFER MADE BY AN ADVERTISEMENT MUST BE ACCEPTED

LORING V. CITY OF BOSTON

7. *Metcalf* 409 (1844)

Assumpsit to recover a reward of \$1,000 offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th, 1841.

At the trial before Wilde, J., the following facts were proved: On May 26, 1837, this advertisement was published in the daily papers in Boston: "\$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26, 1837. Samuel A. Eliot, Mayor." On May 27, 1837, the following advertisement was published in the same papers: "\$1,000 reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One

thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27, 1837. Samuel A. Eliot, Mayor." These advertisements were continued in the papers but about a week; but there was no vote of the City government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burned. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of \$1,000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March Term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the State prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the Fire Department in Boston, in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May, 1837; but that from that time till the close of the year 1841 there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case was taken from the jury, by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit as the full Court should decide.

SHAW, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which any one, capable of performing the service, may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a

valid contract made on good consideration, which the law will enforce. That this principle applies to the offer of a reward to the public at large was settled in this Commonwealth, in *Symmes v. Frazier*, 6 Mass. 344, and it has been frequently acted upon, and was recognized in the late case of *Wentworth v. Day*, 3 Met. 352.

The ground of defense is, that the advertisement, offering the reward of \$1,000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction, that this reward was so offered, in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent for the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published March 26, 1837, offering a reward of \$500; and another on the day following, increasing it to \$1,000. No time is inserted, in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years, or more, and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract, until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing then that, by fair implication, there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a reasonable time—that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be, to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen and citizens generally, to the detection and punishment of offenders. Possible, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects such offer of a reward must be notorious, known and kept in mind by the public at large; and, for that purpose, the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit, then, from such a promise of reward, must in a great measure have ceased. Indeed, every consideration arising from the nature of the case affirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance, perhaps a slight one, is, that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed, for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterward.

But it is not necessary, perhaps not proper, to undertake to fix a precise time, as reasonable time; it must depend on many circumstances. It is somewhat analagous to the case of notes payable on demand, where the question formerly was within what time such notes must be presented and, in case of dishonor, notice be given, in order to charge the indorser. In the earliest reported case on the subject, *Field v. Nickerson*, 13 Mass. 131, the Court went no farther than to decide that eight months was not a reasonable time for that purpose.

Under the circumstances of the present case, the Court are of opinion, that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion, that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

Plaintiffs nonsuit.

AN INFANT'S CONTRACT IS VOIDABLE AND NOT VOID

PHILPOT V. BINGHAM

55 Ala. 435, (1876).

Action to recover an undivided half interest in land. Judgment for defendant. Plaintiff, a minor, and his older brother, executed a power of attorney to their father, authorizing him to sell and convey the land in controversy. Under this power the land was conveyed to one Stringfellow, who conveyed to defendant. Defendant was ignorant of plaintiff's infancy. The trial court charged that the power of attorney and the deed executed under it were voidable and not void.

STONE, J. Ever since the leading case of *Zouch v. Parsons*, 3 Burr, 1794, there has been a growing disposition to treat almost all contracts made by infants as voidable rather than void. The principles of that decision have received a very steady and cheerful support on this side of the Atlantic. The declared rule is, that contracts of an infant, caused by his necessities, or manifestly for his advantage, are valid and binding, while those manifestly to his hurt are void. Contracts falling between these classes are voidable. Relaxation of ancient rigor has had the

effect of placing many transactions, formerly adjudged void, in the more conservative category of voidable. See 3 Washb. Real Prop. 559, et seq.; 2 Kent's Com. 234, in margin; 1 Amer. Leading Cases, 5th ed. 242 et seq., in margin; 2 Greenl. Ev. § 365 et seq; Tyler on Infancy, 41 Tucker v. Moreland, 10 Pet. 58, 65; Boody v. McKenney (10 Shep.), 23 Maine, 517. This question has been several times before the court, and we have uniformly followed the modern rule above expressed. Fant v. Cathcart, 8 Ala. 725; Elliott v. Horn, 10 Ala. 348; Thomason v. Boyd, 13 Ala. 420; Manning v. Johnson, 26 Ala. 446; Freeman v. Bradford, 5 Por. 270; Slaughter v. Cunningham, 24 Ala. 260; Derrick v. Kennedy, 4 Por. 41; Clark v. Goddard, 39 Ala. 164.

It is declared in the adjudged cases, and in the elementary books, that a power of attorney to sell lands, a warrant of attorney, or any other creation of an attorney, by an infant, is absolutely void. Lawrence v. McArter, 10 Ohio, 38, 42; Pyle v. Cravens, 4 Littell, 17, 21; Bennett v. Davis, 6 Cow. 393; Fonda v. Van Horne, 15 Wend. 636; Knox v. Flack, 22 Penn. 33; Tyler on Infancy, 46-47; 1 Amer. Leading Cases, 5th ed. 247, in margin; Saunderson v. Marr, 1 H. Bla. 76; Tucker v. Moreland, 10 Pet. 58, 68; 2 Kent's Com., m. p. 235. So, in Alabama it has been said, "an infant cannot appoint an agent." Ware v. Cartledge, 24 Ala. 628. In Weaver v. Jones, 24 Ala. 424, C. J. Chilton said, "The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps, one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority." C. J. Chilton refers to Parsons on Contracts in support of this proposition. Looking into that work, 244, it is clear that he means to except from the operation of the general rule, laid down by him, those contracts of an infant by which he attempts to create an attorney or agency.

From such an array of authorities, sanctioned as the principle has been by this court, we do not feel at liberty to depart, although the argument in favor of the exception is rather specious than solid. We therefore hold, that the power of attorney, under which the plaintiff's land was sold, made, as it appears to have been, while he was an infant, was and is what the law denominates void. If void, then no title, even inchoate, passed thereby; and the defence to the action must rest entirely on grounds other than and independent of the power of attorney and deed.

Thus circumscribed, the defendant (appellee here) has failed to show any defence to the plaintiff's claim to an undivided half interest in the land sued for. See Boody v. McKenney, 23 Maine, 517; Haney v. Hobson, 53 Maine, 451; Cresinger v. Welch, 15 Ohio, 156.

Judgment reversed.

WHAT CONSTITUTES A NECESSITY WILL DEPEND UPON
THE INFANT'S STATION IN LIFE

TRAINER V. TRUMBULL

141 Mass. 527 (1886)

C. ALLEN. The practical question in this case is, whether the food, clothing etc., furnished to the defendant were necessities for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied. *Angel v. McLellan*, 16 Mass. 28; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512; *Barnes v. Toye*, 13 Q. B. D. 410. So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; just as in the case of a lunatic. 1 Chit. Con. (11th Am. ed.) 197; *Hyman v. Cain*, 3 Jones (N. C.) 111; *Richardson v. Strong*, 13 Lred. 106; *Gay v. Ballou*, 4 Wend, 403; *Epperson v. Nugent*, 57 Miss. 45, 47. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessities, the real value will be inquired into, and he will be held only for that amount. *Earle v. Reed*, 10 Met. 387; *Locke v. Smith*, 41 N. H. 346; Met. Con. 73, 75.

But it is contended that the board, clothing, etc., furnished to the defendant were not necessities, because he, "being a pauper and an inmate of an almshouse, was supplied with necessities suitable to his estate and condition, and, under the circumstances, it would have been the duty of the guardian to place him in the almshouse." It is true that a guardian is not obliged to provide for the support of his ward, when he has no property of the ward available for that purpose; and, if he has no other resources, no doubt he may, under such circumstances, place the ward in an almshouse. The authorities cited for the defendant go no further than this. *Spring v. Woodworth*, 2 Allen, 206. But this

by no means implies that a boy with an expectation of a fortune of \$10,000 should be brought up in an almshouse, if any suitable person will take him and bring him up properly, on the credit of his expectations. On the other hand, it seems to us highly proper for a parent or guardian, under such circumstances, to do what the father did in this case; leaving it for the boy's guardian to see to it that an unreasonable price is not paid. Looking to the advantage of his subsequent life, as well as to his welfare for the time being, his transfer from an almshouse, to a suitable person, by whom he would be cared for and educated, would certainly be judicious; and the support and education furnished to an infant of such expectations, whose means were not presently available, fall clearly within the class of necessities. In *Met. Con. 70*, the authority of Lord Mansfield is cited to the point that a sum advanced for taking an infant out of jail is for necessities. *Buckinghamshire v. Drury*, 2 Eden, 60, 72. See, also, *Clarke v. Leslie*, 5 Esp. 28. Giving credit to the infant's expectations of property is the same as giving credit to him. There was no error in refusing to rule, as a matter of law, that, upon all the facts in evidence, the action could not be maintained. The findings of all matters of fact, of course, are not open to revision.

Exceptions overruled.

DEFENSE OF INFANCY IS A PERSONAL PRIVILEGE

PATTERSON v. LIPPINCOTT

47 N. J. L. 457 (1885)

Action of debt upon the contract stated in the opinion. Judgment below for defendant.

SCUDDER, J. An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, \$75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture and sell the plaintiff's patent "air-heating attachment" in Atlantic county, New Jersey. The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request have refused to pay said balance and that, since payment became due, the plaintiff has found out and charges that said George is under age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is that the defendant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so, talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent right in Atlantic county was drawn to George P. Lippincott. It proved by the admission of the defendant, Barclay Lippincott, that, the time of such sale and transfer his son George was a minor. This admission is competent testimony in this suit against him.

A verdict of a jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the trial of the appeal in the Court of Common Pleas there was a judgment of non-suit against the plaintiff. The reason for the non-suit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal, and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is *Bay v. Cook*, 2 Zab. (N. J.) 343, which follows and quotes *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, to the effect that if a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible, and the agent, when sued on such contract, can exonerate himself from the personal responsibility only by showing his authority to bind those for whom he undertakes to act. *Bay v. Cook* was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the act concerning the poor. As his parole contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on an instrument he executes, without authority, in another's name; that the

remedy in such cases is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Baltzen v. Nicolay*, 53 N. Y. 467; *White v. Madison*, 26 N. Y. 117, and many other cases collected in the notes in *Wharton on Agency* Par. 524, 532, and notes to *Thompson v. Davenport*, 9 B. & C. 78, in 2 *Smith's Lead. Cas.* 377 (Am. ed). *Andrews, J.*, in *Baltzen v. Nicolay*, *supra*, says: "The ground and form of the agent's liability in such a case has been the subject of discussion, and there are conflicting decisions upon the point; but the later and better-considered opinion seems to be, that his liability, when the contract is made in the name of principal, rests upon an implied warranty of his authority to make it, and that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly drawn, there is in the last sentence a charge that the defendant's warranty of authority in pretending to act for said minor is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority during his minority to his father to act for him in the purchase of this patent right. There are two answers to this position. The act of an infant in making such a contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, that a promissory note signed by Dutch for his partner Green, who was a minor, was void as to Green, because he was not capable of communicating authority to Dutch to contract for him, and that being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See *Tyler. Inf. Ch.* 111, Par. 14, 18.

Another answer is that the defense of infancy to this contract with the plaintiff can only be set up by the infant himself or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. *Voorhees v. Wait*, 3 Green (N. J.) 343; *Tyler Inf. Ch. IV*, Par. 19; *Bingham, Inf.*, 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of

affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant, for it may be based on the failure of consideration, the invalidity of the patent, fraudulent representations, or other causes.

The judgment of nonsuit entered in the Court of Common Pleas will be affirmed.

WHAT ARE NECESSARIES?

McKanna v. Merry

61 Ill. 177 (1871)

THORNTON, J. In 1864, Kate Feehan, since intermarried with McKanna, accompanied appellee and wife on a trip from Illinois to California, by water. Her passage money was paid by appellee. Kate was then an infant, and under the control of her guardian, who was desirous that she should attend school for another year, and disapproved of the trip.

The only proof as to the value of her estate is, that it consisted of an undivided one-third of some realty, which after her marriage, and a few years after the advancement of the money, was sold for \$3,250.

There is no proof that this trip was necessary for her health, or that it subserved any purpose other than pleasure, or as company for the wife of appellee.

The court gave for appellee the following instructions:

"What are necessities depends upon the circumstances of the case. If the going of the defendant, Kate, to California was prudent and proper, under the circumstances proved, and the plaintiff advanced money necessary to take her there, and the same was for her benefit, then it is for the jury to determine whether such advances of money were for necessities."

There is no positive rule by means of which it may be determined what are, and what are not, necessities. Whether articles are of a class or kind for which infants are liable, or whether certain subjects of expenditure are necessities, are to be judged by the court. Whether they come within the particular class, and are suitable to the condition and estate of the infant, is to be determined by the jury as matter of fact. For example, suppose this trip had been to Europe, involving in time, several years, and an expenditure of thousands of dollars, would any court hesitate to decide that the money thus advanced did not constitute necessities? Chitty on Con. 141a, note 2; 1 Parsons Con. 296; Beeler v. Young, 1 Bibb. (Ky.) 519; 1 Am. Leading Cases 248.

The court, in the instruction, merely informed the jury that, if the trip was prudent and proper, and that the money was for her benefit, then the jury must determine whether such advances of money were for necessities. There was not a particle of proof to enable the jury to determine as to the propriety or impropriety, the prudence or imprudence of the trip, or that the advancement of the money was for the benefit of appellant.

Even if there had been such proof, the instruction was wrong. The court should have defined necessities in some manner. Blackstone defines necessities to be "necessary meat, drink, apparel, physic," and says that an infant may bind himself to pay "for his good teaching and instruction, whereby he may profit himself afterwards." The articles furnished, or money advanced, must be actually necessary, in the particular case, for use, not mere ornament, for substantial good, not mere pleasure, and must belong to the class which the law generally pronounces necessary for infants.

The courts have generally excluded from the term "necessaries," horses, saddles, bridles, pistols, liquors, fiddles, chronometers, etc. It has been held, however, that if riding on horseback was necessary to the health of the infant, the rule was different.

We have been referred to no case, and, after a thorough examination have found none, in which it has been held that moneys advanced for traveling expenses, under the circumstances of this case, were necessities.

The court should have instructed the jury as to the classes and general description of articles for which an infant is bound to pay. Then the jury must determine whether they fall within any of the classes and whether they are actually necessary and suitable to the estate and condition of the infant.

It may be proper to advert to another principle. The infant had a guardian, who had charge and management of her estate, which consisted entirely of realty. It was the duty of the guardian to superintend the education and nurture of his ward, and apply to such purpose first, the rents and profits of the estate, and next the interest upon the ward's money. This is the positive command of the statute, and he was liable, upon his bond, for non-compliance. He was the judge of what were necessities for his ward, if he acted in good faith.

A third party had no right to intervene and usurp the rights and duties of the guardian. Even if the money paid was, in some sense, for the infant's benefit, and the trip was prudent and proper, yet, if the guardian, in good faith, and in the exercise of a wise discretion, and with reference to the best interests of his ward, supplied her wants and contributed means suitable to her age and station in life, and in view of her

estate, then the infant would not be liable for the money, as necessities. *Beeler v. Young*, supra; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; *Wailing v. Tall*, 9 Johns. (N. Y.) 141.

Judgment reversed and the cause remanded.

A MINOR'S CONTRACT FOR NECESSARIES IS VOIDABLE
BEFORE SUCH NECESSARIES ARE ACTUALLY
SUPPLIED HIM

WALLIN V. HIGHLAND PARK COLLEGE

127 Iowa 131, 102 N. W. 839 (1905)

The plaintiff, a minor entered the pharmacy department of Highland Park College under a written contract that provided for a course of 12 weeks' instruction therein, and for the payment of a stated sum for tuition, board, room rent, light, heat, etc., aggregating the sum of \$83. He paid this sum in advance, quit the school soon thereafter, and brings this suit to recover the unearned portion of the sum so paid. Judgment for defendant. Appeal.

SHERWIN, C. J. There is no dispute as to the facts in this case, and it conceded that a course in pharmacy may come within the definition of necessities for which a minor may be bound by contract; hence the vital question for determination is whether a minor's contract for necessities is voidable before such necessities are actually supplied him. In other words, may a minor disaffirm an unexecuted contract which would have bound him absolutely had it been fully performed. Section 3189 of the Code, in effect, says that a minor is bound by his contract for necessities, and by all other contracts unless they be disaffirmed, etc. But in construing the statute we should look to the reason thereof as an aid to a just determination of the legislative intent. An infant in law has from the earliest time been the ward of the court, and, speaking generally, is incapable of making other than a voidable contract. The one universal exception to this rule is that he may bind himself to pay for his necessary "meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards." 1 Copley's Blackstone, 412. An infant is not permitted to contract generally, because of his immature judgment, and the injury he might suffer on account thereof, and he is only permitted to contract for necessities because otherwise he might suffer for want of them. It is therefore apparent that the protection of the infant is the purpose of the exception as well as of the general rule.

Both of these propositions are so firmly established by authority that we need not cite the cases in support thereof. The great weight of authority, and the reason of the rule certainly sustains it, is that an infant is not bound by the terms of an express contract for necessities, and that in no event can a recovery be had for more than their reasonable value. Bishop on Contracts, §908; Beach on Contracts, par. 1368; *Locke v. Smith*, 41 N. H. 346; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. It is therefore manifest that contracts for necessities are sustained for the benefit of the infant only, and not for the benefit of the tradesman. See, also, note in *Craig v. Van Bebber* (Mo.), 13 S. W. 906, 18 Am. St. 643. And, if this be true, it must logically follow that an unexecuted contract for necessities may be disaffirmed unless it be otherwise provided by statute. *Johnson v. Lines*, 6 Watts and S. (Pa.) 80, 40 Am. Dec. 543; *Pool v. Pratt*, 1 D. Chip. 252; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *Pollock's Prin. of Contracts*, 53, and note F. For the necessities which have been furnished to him the infant is bound to pay because of the benefit received, but when the unfurnished things contracted for are no longer necessary the reason for the rule ceases, and with it the infant's liability, if he chooses to disaffirm the contract. Were the rules otherwise, a contract for necessities to be supplied in the future might be enforced to the great injury of the infant because of a change in his condition which rendered the things no longer necessities. The statute, in so far as it relates to contracts of this class, is simply declaratory of the common law, and must be held to intend nothing more than that an infant is bound for necessities actually provided him. The rule may be an unjust one in some cases, but it will generally protect the tradesman as well as the infant, and it is, we believe, in accord with principle and authority.

The judgment is reversed.

DENTAL WORK IS A NECESSARY

STRONG V. FOOTE

42 Conn. 203 (1875)

PARDEE, J. In suits against minors, instituted by persons who have rendered services or supplied articles to them, the term "necessaries" is not invariably used in its strictest sense, nor is it limited to that which is requisite to sustain life, but includes whatever is proper and suitable in the case of each individual, having references to his circumstances and condition in life.

The defendant applied to the plaintiff for relief from pain and the prevention of its recurrence; he, finding the cause in the defendant's decaying and neglected teeth, immediately began the work of relief and repair, and continued the same from time to time during a period of six weeks, until its completion. It was necessary for the preservation of the teeth and the charge therefor is reasonable in amount. In view of the circumstances of this defendant, we have no hesitation in saying that the services are within the legal limitations of the word "necessaries".

The teeth upon inspection disclosed their condition to the plaintiff; he could see that they had been neglected and were decaying; and the record does not reveal any effort or intention even on the part of the guardian to repair or preserve them.

Again, friends of the defendant in New Haven had twice previously taken him to the plaintiff for dental services, for which bills had been made out in his name, and had been paid, his guardian furnishing the money without warning or objection to the plaintiff. These acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services, as a pre-requisite for a recovery in this suit, the work being necessary to meet an unsupplied want. *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Brayshaw v. Eaton*, 7 Scott 187; *Dalton v. Gibbs*, 7 Scott 117; 2 *Greenleaf on Evidence* 366.

There is no error in the judgment complained of.

LIABILITY OF MINOR AS LESSEE

GREGORY V. LEE

64 Conn. 407, 30 Atl. 53 (1894)

The case was tried before a justice of the peace in New Haven, where the plaintiff had judgment. The defendant took an appeal to the Court of Common Pleas in New Haven County, where the court sustained defendant's demurrer to the plaintiff's reply and rendered judgment for the defendant. Plaintiff alleged this was error and appealed.

J. TORRANCE. "The complaint in this case alleges that on the first of June, 1892, the defendant being a student in Yale College, entered into a contract with the plaintiff by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of ten dollars per week, payable weekly, and immediately entered into possession of said room and has neglected and refused to pay the rent of said room for the ten weeks ending February 7, 1893." . . .

It thus appears that the defendant, a minor agreed to hire the plaintiff's room for forty weeks at \$10 per week, and that he entered into

possession and occupied it a part of said period; that he gave up and quit possession of the room and refused to fulfill said agreement, on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere.

Under the facts stated, it must be conceded that this room, at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary, for lodging comes clearly within the class of necessities; and the room in question was a suitable and proper one, and during the period he occupied it was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt." *Chapple v. Cooper*, 13 Mees. & W. 252; 1 Swift Dig. 52.

So long, then, as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Hyman v. Cain*, 2 Jones (N. Car.) III. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessities. *Earle v. Reed*, 10 Met. (Mass.) 387; *Barnes v. Barnes*, 50 Conn. 572. *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Keener Quasi-Cont.*, p. 20. This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities. For the purpose of this case, perhaps, we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be a *parol lease*, under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it

in the former light, then the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessities which the defendant refused to take, and never has had, and which, therefore, he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense.

As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley v. Mallory*, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule.

"An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. . . . As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." *Tayl. Landl. & Ten.*, p. 96. In this case the defendant gave up the room and repudiated the agreement so far as it was in his power to do so, in the most positive and unequivocal manner. The plea of infancy, then, under the circumstances must prevail. . . .

There is no error.

AN INFANT MAY DISAFFIRM A PROMISE OF MARRIAGE

RUSH v. WICK

31 Ohio St. 521 (1877)

Action for breach of a marriage promise. Defense, that at the time the promise was made defendant was an infant under the age of twenty-one years. Demurrer to this defense overruled.

By THE COURT. The demurrer was rightfully overruled. A contract to marry, made by an infant, stands upon the same footing as respects his rights to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election. The fact that under the statute (67 Ohio L. 6) an infant may be joined in marriage at the age of eighteen, if a male, and sixteen, if a female, having first obtained the assent of the father, or in case of his death or incapacity, of the mother or guardian, does not affect the right to refuse to perform the contract.

The right to avoid or disaffirm the contract of an infant grows out of his supposed incapacity to protect himself from improvident bargains and relations. And there can be no case where the right to avoid or disaffirm is of more vital concern to his future welfare than where he has made an improvident marriage engagement. The infant's right to avoid such engagement or contract is affirmed by the following authorities. *Holt v. Ward*, 2 Strange 937; *Cannon v. Alsbury*, 1 A. K. Marshall (Ky.) 56; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; *Williard v. Stone*, 7 Cow. (N. Y.) 22; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Pool v. Pratt*, 1 Chip. (Vt.) 252; Bac. Ab., title Infancy and Age, 135; 1 Chitty on Con. 222; Shouler's Dom. Rel. 535; Mackpherson on Infants 121.

AN INFANT IS LIABLE FOR NECESSARIES FOR HIS FAMILY

CANTINE V. PHILLIPS

5 Harr. (Del.) 428 (1854)

This was an action of assumpsit by a father-in-law, against the representatives of a deceased son, for board and other necessities furnished his wife (plaintiff's daughter) and her child and nurse. There were also charges for board of the son-in-law.

The case turned on the question, whether an assumpsit was implied in law under the circumstances, as between parties bearing this relation to each other. It was twice tried, and resulted finally in a verdict for the defendant.

BY THE COURT. Assumpsit by a father against the estate of his son-in-law, for the board and lodging of the daughter and her child and servant, and also of the son-in-law himself.

It is alleged that James W. Phillips, having married the daughter of Cantine, did, at various times and for considerable periods live in the family of the wife's father; for which a compensation is demanded in this action.

1. On the part of the defendant it is contended that no action can be sustained on such a claim, founded on any implied engagements to pay board. That as between father and daughter, or daughter's husband, living in the father's house, no contract can be implied for the payment of board.

The court assents to this proposition. Persons in such a near connection as father and children do not usually live together upon a footing of obligation to account with and pay for attentions and services, or board and lodging. When the parties intend to live in that way,

it is but reasonable to require that there should be an express understanding between them to that effect. That is what is meant by the distinction between an express and an implied contract; and that does not mean a bargain in so many words to pay so much money weekly; but the recognition of this kind of understanding between them, as the admission of the party that he was a boarder and not a guest; the payment of money as board, etc.

We therefore express the opinion, that unless such an understanding or agreement existed between the father and his son-in-law, as a matter of contract, the plaintiff cannot recover in this case.

2. If these parties lived together without such understanding, but upon the expectation or promise of a gratuity, by way of gift or present, the plaintiff could not recover such gratuity, in an action.

3. But it is further alleged, on the defendant's part, that if any contract had been proved to pay board, such contract was made by Phillips when he was under age and did not bind him. That is the case with the general contracts of minors. Being regarded by the law as infants, until the age of twenty-one, such persons are incapable of making general contracts; but there are certain contracts, which, from necessity, they are allowed to make, and that is, for necessities for themselves and family. The same necessity exists as to the family of an infant; and if old enough to contract marriage, an infant is liable on contracts for the necessary board and lodging of his wife and children. And if such liability exists, it may be enforced against the infant's estate, though he die under age.

AN INFANT IS LIABLE FOR A TORT COMMITTED IN VIOLATION OF HIS CONTRACT

FREEMAN V. BOLAND

14 R. I. 39 (1882)

Exceptions from Court of Common Pleas.

Action of trover by Freeman & Francis against Frank P. Boland for the alleged conversion of a horse and buggy. Verdict and judgment for plaintiffs. Defendant alleged exceptions.

DURFREE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having gotten them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defense to an action *ex delicto*, for tort committed under contract or in making it. But

that is not this case. The act here complained of was committed, not under contract, but by abandoning it, the bailment being thus determined. The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne v. Wiley*, 23 Vt. 355; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch, 226; *Green v. Sperry*, 16 Vt. 390; *Campbell v. Stakes*, 2 Wend. 137; Add. Torts paragraph 1314. We understand that the defendant does not ask us to decide the questions raised by the other exception, the exceptions being waived.

Exceptions overruled.

EFFECT OF INSANITY ON A CONTRACT

BEACH V. THE FIRST METHODIST EPISCOPAL CHURCH

96 Illinois, 177 (1880)

DICKEY, C. J., delivered the opinion of the Court.

The record shows that Lorenzo Beach had presented to him a subscription paper in the following words:

"Fairbury, February 14, 1874.

"We, the undersigned, agree to pay the sum set opposite our respective names, for the purpose of erecting a new M. E. Church in this place, said sums to be paid as follows: One third to be paid when contract is let, one third when building is enclosed, one third when building is completed. Probable cost of said church from ten thousand dollars (\$10,000) to twelve thousand dollars (\$12,000)."

To which he attached and subscribed the following:

"Fairbury, 1874.

"Dr. Beach gives this subscription on the condition that the remainder of eight thousand dollars is subscribed.

* * * * *

"Lorenzo Beach,

\$2,000."

On April 20, 1875, Lorenzo Beach was adjudged by the County Court of Livingston County, insane, and Thomas A. Beach and C. C.

Bartlett were appointed conservators of his person and property, and they continued to act as such until the death of Dr. Beach, which occurred in August, 1878.

Other subscriptions to the amount of \$8,000 toward the building of this church were obtained. The construction of the church was begun about September of 1876; and while there is some dispute on the question of whether the church was ever fully finished, for the purposes of this opinion we will assume that the building was finished before June, 1877. About June, 1877, the church was badly damaged by a hurricane. In September, 1877, when the trustees and members of the congregation were consulting as to the propriety of immediately repairing the same, one of the conservators of the person and property of Dr. Beach, being at the meeting, it is said, pledged the society the prompt and full payment of the unpaid residue of the subscription. This unpaid residue was about \$666—the conservators having paid the first two installments of the subscription after the building of the church was begun.

This action was brought shortly before the death of Dr. Beach for the last installment of the subscription, \$666. After his death his heirs were made parties, under a stipulation, and defended the action.

In the Circuit Court judgment was rendered for the unpaid one third of the subscription and costs. On appeal to the Appellate Court, that judgment was affirmed. The defendants appeal to this Court.

The subscription made by Dr. Beach was, in its nature, a mere offer to pay that amount of money to the church upon the condition therein expressed.

There is nothing in the record tending to show that the church, in this case, took any action, upon faith of this subscription, until after Dr. Beach was adjudged insane, or that the church paid money or incurred any liability. His insanity, by operation of law, was a revocation of the offer. In *Pratt, Administratrix, etc., v. The Trustees of the Baptist Society of Elgin*, 93, Ill. 475, this Court said, in relation to such a subscription: "The promise, in such a case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death of the promisor, before the offer is acted upon, is a revocation of the offer. . . . The continuance of an offer is in the nature of its constant repetition, which, of course, necessarily requires some one capable of making a

repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

The ground upon which the Court rested its judgment in the Pratt Case was the want of capacity on the part of the promisor to continue his promise or offer. The insanity of Dr. Beach rendered him, in law, as incapable of making a contract or of continuing or repeating an offer to the church as if he had been actually dead.

Conservators of the person and property of an insane man may perform personal contracts of their ward legally subsisting, under some circumstances; but in this case there was no contract between Dr. Beach and the church. The paper signed by Dr. Beach was of such a nature that no binding contract sprang therefrom until the church had accepted the same by incurring some legal liability, or expending money upon the faith of it. There being no binding contract upon Dr. Beach at the time that his conservators made the payments, they had no lawful authority to make the same, and the estate of Dr. Beach was not bound thereby.

The judgment of the Appellate Court in this case must be reversed and the cause remanded.

Judgment reversed.

DEFINITION OF CONSIDERATION

HAMER V. SIDWAY

124 N. Y. 538, 27 N. E. 256 (1891)

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right to recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, II, on his twenty-first birthday, in the sum of \$5,000. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, II that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, II, the sum of \$5,000 for such refraining, to which the said William E. Story, II agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, and

insists that it follows that, unless the promisor was benefited, the contract was without consideration—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer chamber in 1875 defined "consideration" as follows; "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. 444. "Any damage or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent Comm. (12th ed.) 465. Pollock, in his work on contracts (p. 166), after citing the definition given by the exchequer chamber, already quoted, says; "The second branch of this judicial description is really the most important one. 'Consideration' means, not so much that one party is profiting, as that the other abandons some legal rights in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the condition imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage

with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle. Charles Shadwell." It was held that the promise was binding, and made upon good consideration. In *Lakota v. Newton* (an unreported case in the Superior Court of Worcester, Mass.) the complaint averred defendant's promise that "If you (meaning the plaintiff's) will Leave off drinking for a year I will give you \$100.00," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. 297, the step grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

BLOOD OR NATURAL AFFECTION IS NOT A SUFFICIENT
CONSIDERATION TO SUPPORT AN EXECUTORY
CONTRACT

FINK V. COX, EXECUTOR
18 Johns. (N. Y.) 145 (1820)

Action of assumpsit brought to recover amount of a promissory note given by the testator, Alexander Fink, to his son, the plaintiff. Verdict for plaintiff.

SPENCER, J. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff. There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration.

Schoonmaker v. Roosa and DeWitt, 17. Johns Rep. 301. The only consideration pretended, is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not. . . .

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is, undoubtedly, a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed against all persons but creditors and bona fide purchases; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss or prejudice of the promisee. The note here manifested a mere intention to give the \$1,000. It was executory, and the promisor had a locus poenitentiae. It was an engagement to give and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money or chattel, that such a promise can be enforced at law.

Judgment for defendant.

A BURDEN INCURRED AT THE REQUEST OF THE OTHER
PARTY IS A SUFFICIENT CONSIDERATION

DEVECMON V. SHAW AND DEVRIES, EXECUTORS

69 Maryland, 199 (1888)

BRYAN, J. Johns Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common courts and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all the money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment

of the money by the defendant, there could be a recovery in indebitatus assumpsit; and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendant's testator in his lifetime, at his request." In the bill of particulars we find this item; "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

MUTUAL MISTAKE AS TO THE QUALITY OR VALUE OF AN
ARTICLE WILL NOT IN THE ABSENCE OF FRAUD, AND
WHEN IT IS CLEAR THAT THE PARTIES ARE AGREED
AS TO THE SUBJECT MATTER, AVOID A CONTRACT

WOOD V. BOYNTON

64 Wis. 265 (1885)

Plaintiff found an uncut stone of questionable value. She took it to the firm of Boynton & Boynton, partners in the jeweler business and asked Samuel Boynton, one of the members of the firm, what it was worth. Both parties supposed it to be worth but little. The defendant bought the stone for \$1.00. Later it was discovered that the stone was an uncut diamond worth about \$700. Plaintiff brought this action to recover possession of the stone. There was a verdict for the defendant in the circuit court and the plaintiff appealed.

TAYLOR J. . . . The evidence clearly shows that the plaintiff sold the stone in question to the defendants in December 1883, for a consideration of \$1.00. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons' of the purchase money with interest and the demand of a return of the stone to the plaintiff unless such tender and demand re-vested the title in the appellant she cannot maintain her action. The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so re-vest the title in her. The only reason we know of rescinding a sale and re-vesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against the vendee are (1) that the vendee was guilty of some fraud in procuring the sale to be made to him: (2) that there was a mistake made by the vendor in delivering the article which was not the article sold—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. . . . In this case upon the plaintiff's own evidence there can be no just ground for alleging that she had been induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant of the character of the stone and of its intrinsic value.

Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone except to take it in his hand and look at it before he made the offer of \$1.00, which was refused at the time and afterwards accepted without any comment or further examination by Mr. Boynton. The appellant had the stone in her possession for a long time and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama etc. Mail Co. L. R.*, 2 Q. B. 580.

There is no pretence of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made and the thing sold was delivered to the vendee when the purchase price was paid. . . .

Judgment of the circuit court is affirmed.

**A MUTUAL MISTAKE WILL ENTITLE A BUYER TO RECOVER
BACK HIS EARNEST MONEY**

STONG V. LANE

66 Minn. 94, 68 N. W. 765 (1896)

Action by Stong. Verdict for plaintiff. Order refusing a new trial. Appeal.

MITCHELL, J. While the amount in controversy is small the principle involved is important. The facts are practically undisputed. The plaintiff being desirous of purchasing a lot as a site for a dwelling, a mutual acquaintance of the parties (but for whose acts defendant was in no way responsible) pointed out to plaintiff a lot which he said defendant had for sale. The lot thus pointed out fronted east on Third avenue south, being the second lot north from Franklin avenue, in Minneapolis. The party was mistaken. The lot which defendant had for sale (as agent for the owner) was the one directly opposite on the other side of Third avenue, being the side "Judge Jones' house is on." This lot fronted west. It was also the second lot north from Franklin avenue, but, as already stated, on the opposite side of Third avenue from the one pointed out to plaintiff. Thereupon plaintiff went to see defendant. The precise words by which he opened negotiations do not clearly appear, but their substance was that plaintiff either asked defendant if he had for sale a lot on Third avenue south, or stated that a lot had been pointed out to him by this mutual acquaintance as one that defendant had for sale, and inquired the price. The evidence is undisputed that defendant told plaintiff that he had for sale the lot on Third avenue south, being the second lot north of Franklin avenue, and "on the same side of the street Judge Jones' house was on." Nothing was said as to whether the lot fronted east or west. It is undisputed that Judge Jones' house is on the east side of Third avenue, and hence that a lot on that side would front west. Without defendant's giving any further or more definite description of the lot, and without plaintiff making any further inquiry as to its description and location, the plaintiff proceeded to negotiate as to price. The result was a verbal bargain of sale and purchase for \$2,500, of which plaintiff paid down \$100, the balance to be paid when the title was ascertained to be satisfactory, and upon defendant's procuring the proper deed. It appears that defendant's arrangement with the owner of the lot was that he was to have as his commission all he sold the lot for over \$2,500. But without waiting for the sale to plaintiff to be consummated, defendant immediately went to the owner, and himself bought the lot for \$2,400, paying on the purchase price the \$100

which he had received from plaintiff, and taking a deed running directly to the plaintiff. Very soon afterwards, on submitting to his counsel the abstract of title furnished by the defendant, plaintiff discovered that the lot described in it was not the lot which had been pointed out to him, and which he supposed he was buying. He then informed the defendant of his mistake, and demanded back his \$100, which defendant refused to pay, but tendered a deed which plaintiff refused to accept, and then brought this action to recover back the \$100. The evidence is undisputed that plaintiff was laboring under an honest mistake, and supposed that he was buying the lot which had been pointed out to him. It is also undisputed that defendant was equally honest in supposing he was selling the lot on the other side of the street, for which he was agent, and that he had no notice of plaintiff's mistake. It will be observed that the description of the two lots was the same except the reference to "the side of the street Judge Jones' house is on," which was applicable to the lot defendant had for sale, but inapplicable to the one which plaintiff supposed he was buying. It is familiar law that an honest mistake of one of the parties may be good ground for refusing specific performance, and leaving the other party to his action for damages, while it would be no ground for a rescission of the contract. But the question here is whether, upon the facts, plaintiff is entitled to a rescission, for that is, in effect, what he is asking for in seeking to recover the \$100.

The trial judge instructed the jury to the effect that, to constitute a contract, the minds of the parties must have met—that is, as applied to this case, both parties must have had in mind the same lot; that if one of them referred to one lot, and the other to another lot, then there was no meeting of the minds of the parties, and hence no contract. Considered as a statement of the general rule of law, this might be incomplete and even incorrect. If there be a meeting of the minds upon the terms of the contract, and those terms are free from ambiguity, and there be no fraud or misrepresentation, a mistake of one of the parties only, resting wholly in his own mind, as to the identity of the subject matter of the contract, was never held in any well-considered case to be a ground for rescission. If it was, then all contracts would rest on a very uncertain foundation. Undoubtedly, in order to create a contract, the minds of the parties must meet and agree upon the expressed terms of the contract. Thus, in *Rupley v. Daggett*, 74 Ill. 351, one party offered to sell a horse for \$165; the other party understood him to say \$65. It was held that there was no contract. To the same head may be referred cases where a person, by mistake, enters into a different kind of agreement from that which he intended to make or supposed he was

making; as where he signed a bond supposing it to be a mere petition, or which he supposed he was signing merely as a witness. See *Thoroughgood's Case*, 2 Coke 9; *Foster v. McKinnon*, L. R. 4 C. P. 704. To the same general principle may be referred those cases where, after the parties have apparently agreed to the terms of a contract, it is made to appear that there was a latent ambiguity in an essential word, by which one of the parties meant one thing, and the other a different thing, the essential word being applicable to both. See *Raffles v. Wichelhaus*, 2 Hurl. & C. 906; *Kyle v. Kavanaugh*, 103 Mass. 356. In all these cases it was held there was no binding contract, because the minds of the parties had never met on its terms. But suppose, in *Raffles v. Wichelhaus*, there had been but one ship named *Peerless*, and hence no latent ambiguity in the terms of the contract; the defendant could not have been released from his contract merely because he had in mind, and supposed he was contracting with reference to, another ship of a different name. . . . We do not wish to be understood as endorsing the erroneous meaning not infrequently attached to the legal maxim that, to create a contract, the minds of the parties must meet and "agree on the same thing in the same sense." . . .

Order affirmed.

FRAUDULENT REPRESENTATION

ANTLE AND BROTHER V. SEXTON ET AL

137 Ill. 410, 27 N. E. 691 (1891)

BAKER. J. This was an action on the case, by appellees, against appellants to recover damages for fraud and deceit in the sale of timber standing on the land of one Jameson. The subjects of the sale were the timber that had been bought by appellants from Jameson, a saw-mill and its appurtenances, and thirteen acres of timber on the Hadley land. The sum of \$3,000 in gross, was paid for the property, no separate price being fixed for the different articles. The ground of fraud relied on was the representation that the tract of timber bought from Jameson contained eighty acres, when in fact the Jameson contract only conveyed to appellants thirty acres of timber. Appellees recovered in the circuit court judgment for \$900, and that judgment was affirmed in the appellate court, and the cause was brought here on a certificate of importance.

In the written contract signed by the parties it is recited that the appellants agreed as follows:

"Second—That they hereby assign and transfer to said Sexton & Bybee all interest which they have acquired in and to about eighty

acres of saw-timber in Gardner township, Sangamon County, Illinois under a contract heretofore entered into by the said N. C. Antle & Bro. with one S. H. Jameson.

"Fourth—They hereby agree to assign over to said Sexton & Bybee the written contracts with said Jameson & Hadley, above referred to."

It is suggested by appellants, that where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is open to inspection, the purchaser cannot be heard to say that he was deceived by the vendor's misrepresentations, and fault is found that the court instructed the jury, that if the representation was made "in such a way and under such circumstances as to induce a reasonably prudent man to believe that the matter stated was true," and if the plaintiffs, "in the exercise of reasonable prudence believed the representation to be true," etc., it sufficiently sustained the action for deceit. The false representation consisted in misstating the terms of the Jameson contract, and the parties did not stand upon an equal footing in respect thereto. Said contract was in the possession of appellants, and they had full knowledge of its provisions, while appellees did not have access to it, and it was withheld from their inspection upon a plausible pretext stated by appellants. The land upon which the timber grew was in a peculiar shape, and was contiguous to other timber lands, and although the timber was pointed out to appellees, yet it is manifest that without a knowledge of the boundaries and an actual measurement, no person could tell the number of acres in the tract. In numerous instructions given by the court, the knowledge of appellants that the representation was false, and the fact that the same was made with intent and for the purpose of deceiving and defrauding appellees, were made conditions precedent to the right of recovery. Surely, where a misrepresentation is made as to a material fact, and such misrepresentation is made knowingly, and for the express purpose of deceiving and defrauding and the party injured relies upon the statement made and under circumstances which would induce a reasonable prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of the court in such case, upon the plea he did not avail himself of the means of knowledge open to him, would be offering a premium on fraud and would be destructive of confidence in business transactions. There was no error of which appellant can complain in instructing the jury as above indicated. *Linnington v. Strong*, 107, Ill. 295; *Endsley v. Johns*, 120 id. 964; *Schwabacker v. Riddle*, 99 id. 343; *Hicks v. Stevens*, 121 id. 186. . . .

Judgment affirmed.

CONTRACT DURING THE LIFE OF ANOTHER IS NOT WITHIN
THE STATUTE OF FRAUDS

HEATH V. HEATH

31 Wis. 223 (1872)

Action for one-half of the amount expended by one of the parties over that expended by the other under an oral contract between them to support their mother for the remainder of her life. Counter-claim by the defendant for expenses in taking care of the mother for five years while plaintiff was absent from the State. Verdict for the defendant.

COLE, J. . . . These parties are brothers, and the defendant offered evidence tending to prove that a verbal contract was entered into between them in 1861, by which they agreed to support their mother during her natural life—each one contributing equally thereto in consideration of the homestead, which she had conveyed to them. It is suggested that such a contract would be void, because by its terms, it was not to be performed within a year from the making thereof. But this is a mistake. It is apparent that this contract might have been entirely performed within a year consistently with the understanding of the parties, because Mrs. Heath might have died within that time. "When the promise is to continue to do something until the contingency occur, as for instance to pay during the promisee's life; to pay during the life of another; to board the promisee during his life; to pay the expenses of a child so long as it should be chargeable to the town; to educate a child; to support a child, who is eleven years old, till she is eighteen; to pay during coverture; in all these cases the promise is not affected by the statute, because the party whose life is involved may die within the year." Browne on Frauds (2d ed.), chap. 13, p. 276. . . .

Judgment affirmed.

"PUFFING GOODS" IS NOT FALSE REPRESENTATION

GORDON V. PARMELEE

2 Allen (Mass.) 212 (1861)

An action on a promissory note given by the defendant in payment for a farm. In the lower court the defendant was allowed to prove by way of recoupment in damages, that the plaintiff falsely represented that the farm was of a soil and capacity for productiveness and keeping of stock, greatly superior to what it was in fact, and that the land was covered with snow so the defendant could not judge of its productive-

ness and had to rely on the defendant's statements. Verdict for the plaintiff and the defendant alleged exceptions.

BIGLOW, C. J. The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defense to the notes. They fall within the class of affirmations, which, although known by the party making them to be false, do not, as between vendor and vendee, afford any ground for a claim of damages, either in an action on the case for deceit, or by way of recoupment in a suit to recover purchase money. They come within the principle embodied in the maxim of the civil law, *simplex commendatio non obligat*. Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptations to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property. . . . Exceptions overruled.

SUFFICIENCY OF MEMORANDUM

GAULT V. STORMONT

51 Mich. 636 (1881)

Gault owned a house and two lots in Wyandotte. On April 26, 1881, he sold the place to Stormont for \$1050. Defendant paid \$75.00 down and the plaintiff gave him the following receipt:

"Wyandotte, April 26, 1881.

"Received from George Stormont the sum of Seventy-five dollars as part of the principal of ten hundred and fifty dollars on sale of my

house and two lots on corner of Superior and Second Streets in this city.

DAVID GAULT."

Gault was unable to give a deed because his wife would not join, so he returned the \$75.00 to Stormont, who refused to receive it. Gault then brought this suit of forcible entry and detainer against Stormont for possession of the land which he had allowed Stormont to enter.

Judgment for defendant. Plaintiff appealed.

COOLEY, J. " . . . On the merits the case is plainly with the plaintiff. There was no written evidence of the sale of the lots except the receipt which was given for the seventy-five dollars, and that was insufficient to answer the requirement of the statute of frauds, for though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to rest in parol.

Judgment entered for plaintiff.

PART PAYMENT WILL TAKE A CONTRACT OUT OF THE STATUTE OF FRAUDS

WEIR V. HUDNUT

115 Ind. 525 (1888)

Action for damages caused by defendant's breach of contract to take and pay for 5,000 bushels of corn. Plaintiff alleged that defendant agreed to pay to the plaintiff for said corn fifty cents per bushel, and in part payment therefor, in addition to said fifty cents per bushel, the defendant further agreed to hire to plaintiff and to give him the use of 1,500 sacks in which to sack said corn and deliver the same to the defendant, which said use of said sacks became and was a part of the purchase price of the corn; that the use of said sacks was worth \$25. Plaintiff further alleged his due tender of the wheat at the agreed place, and defendant's refusal to accept the same and pay the balance of the price. Defendant demurred. Judgment was rendered for defendant, on the ground that the statute of frauds had not been complied with; and plaintiff appealed.

ELLIOTT, J. This complaint, it is important to note, avers that the delivery of the sacks, in which the corn was to be placed, to the seller was in part payment of the price of the corn. It is averred, not only that payment was to be made in money and by furnishing the sacks, but

that part payment was made of the agreed price by furnishing the sacks. We emphasize the fact that it is agreed that payment should be made by furnishing the seller with sacks, and that the sacks were furnished to him as part payment of the price of the corn which the appellee purchased. It is this fact which distinguishes the case from *Hudnut v. Weir*, 100 Ind. 501. Here the complaint avers, and the demurrer admits, that it was agreed that the sacks were to be furnished in part payment, and that in part payment they were furnished. In the complaint which came before us in *Hudnut v. Weir*, *supra*, there was no such averment. It is perhaps difficult to conceive how the averment can be established by evidence but with that question we are not now concerned, for it is admitted to be true. It will not, of course, be sufficient, to prove a part performance, for that will not be an "earnest to bind the bargain," since the plaintiff must prove payment, as payment, of part, at least, of the agreed price. But, as the case is presented to us, there was, it is conceded by the demurrer, payment of part of the price agreed upon by the contracting parties.

They agreed what should be taken in payment, and what was agreed upon was in part actually paid.

What the parties agree shall constitute payment the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in service. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. *Kuhns v. Gates*, 92 Ind. 66; *Tilford v. Roberts*, 8 Ind. 254.

It has been held in many cases that payment in articles of property will bind the bargain and prevent the operation of the statute of frauds. *Sharp v. Carroll*, 66 Wis. 62; *Bach v. Owen*, 5 T. R. 409; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Hunter v. Wetsell*, 84 N. Y. 549; *Combs v. Batemen*, 10 Barb. 573.

Part payment of the price is earnest money, and binds the bargain. *Howe v. Hayward*, 108 Mass. 54; *Bissel v. Balcom*, 39 N. Y. 275; 2 Black. Com. 447; *Wood on Frauds*, 294.

The complaint brings the case within the principles declared by the authorities, for it shows that the value of the use of the sacks was twenty-five dollars, and that the purchase price to that extent was paid by the seller's furnishing the sacks for the use of the buyer. If the seller had agreed to furnish for the use of the buyer a corn-sheller, or some other machine, as part payment of the purchase price, it would be very clear that such payment would bind the bargain, and there is no difference

in principle between such a case and one like the present, for it can make no difference what thing of value is given in part payment. Of course the thing must be given in part payment of the purchase money agreed upon, or it will be unavailing; but here, as we have said, the property furnished the buyer is conceded to have been in part payment of the agreed price of the corn.

Judgment reversed.

THE MEMORANDUM MAY CONSIST OF TWO OR MORE
PIECES OF PAPER

OLIVER V. HUNTING

See under Sales, page 96

A MEMORANDUM MUST SHOW WHO IS THE BUYER AND
WHO IS THE SELLER

FRANK AND COMPANY V. ETTRINGHAM

See under Sales, page 96

THE MEMORANDUM MUST SHOW OF WHOM THE GOODS
WERE BOUGHT

BROWN V. WHIPPLE

58 N. H. 229 (1877)

Assumpsit for not accepting lumber. Verdict for the plaintiff: motion of the defendant for a new trial. As evidence of the memorandum required by the statute of frauds, the plaintiff introduced, subject to exception, a letter written and signed by the defendant, a memorandum written by the defendant and a letter written and signed by the plaintiff.

Lancaster, Dec. 21, 1867.

J. B. Brown, Esq. Dear Sir: Can you get 20 M. feet maple, the best quality, the coming winter, saw it in the spring (or winter), and deliver it at the depot at your place in July next? If so, how much per M.? Please call at my place when you are at Lancaster, and we will talk it over, or write me all the particulars.

Respectfully yours,
J. M. WHIPPLE.

Rock maple, clear, for J. M. Whipple, 15,000 feet; 10,000 2 inches thick; 5,000 feet 1½ inches thick. To be delivered at the railroad track. Price \$20 per M.

May, 1868.

John M. Whipple: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track.

JAMES B. BROWN.

DOE, C. J. When one document refers to another, the latter is, for the purpose of such reference, incorporated with the former. 1 Starkie, Ev. 359 (p. 580 of 4th Eng. ed.); *Simons v. Steele*, 36 N. H. 73, 83; *Church v. Brown*, 21 N. Y. 315, 330-334. A list of taxes may, by annexation and reference, be made a part of a tax-collector's warrant, *Bailey v. Ackerman*, 54 N. H. 527. In *Tallman v. Franklin*, 14 N. Y. 584, it was held that a document was made a part of a memorandum by being fastened to it by a pin before the memorandum was signed, a blank column of the memorandum being headed "Terms of sale," and the annexed document having the same heading and containing terms of sale.

In this case, the letter written by the plaintiff to the defendant is no part of the memorandum required by the statute of frauds because it is neither signed by the defendant, nor made, by annexation or reference, a part of a writing signed by him. 2 Kent, Com. 511; *Benjamin on Sales*, par. 222-237; *Blackburn on Sale*, 46-54; authorities cited in *Morton v. Dean*, 13 Met. 385, and in *Browne on Statute of Frauds*, 346-348, 371-376; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Skelton v. Cole*, 1 DeGex & J. 587.

If it was held in *S. F. M. Co. v. Goddard*, 14 How. 446, and in *Lerned v. Wannemacher*, 9 Allen, 412, that, by a writing signed by the plaintiff not signed by the defendant (the party to be charged), and not made a part of a memorandum signed by the defendant, the plaintiff may prove a fact which the statute required to be proved by a memorandum signed by the defendant, those cases are in conflict with a mass of authority too great to be overthrown. The soundness of the contrary doctrine was, in the former case, demonstrated in the dissenting opinion of two judges, and was, in the latter case, substantially admitted.

In *Beckwith v. Talbot*, 95 U. S. 289, 292, it was a question of legal construction whether the written agreement, signed by the plaintiff, was sufficiently identified and referred to by the defendant, in his letters, to make it part of a memorandum signed by him. It was held that

the general rule is, that collateral papers, adduced to supply the defect of signature of a written agreement, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. In what was said of an exception in cases where parol evidence leaves no ground for doubt, we do not concur. Unless the essential terms of the sale can be ascertained from the writing itself, or by references in it to something else, the writing is not a compliance with the statute; and if the agreement be thus effective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute is intended to prevent. *Williams v. Morris*, 95 U. S. 444, 456. A defective reference can no more be cured by parol than any other defective part of the memorandum.

The writing, called in this case the defendant's memorandum, is insufficient, because, if it is signed by the defendant, and if it shows that he bought lumber of some one, it does not show of whom he bought it. The defendant's letter of inquiry is insufficient, because it does not show that he bought or agreed to buy anything of anybody. If the necessary memorandum were described in the statute (Gen. St. c. 201, p. 14) as a scintilla of proof of the essentials of the bargain, and if the question were whether, in fact, the plaintiff is the person with whom the defendant contracted, one question of law would be whether the defendants' memorandum and letter (with or without other evidence) are competent for the consideration of a jury. But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not stated in the writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them. Taken together, with all the meaning that is expressed and all that can be implied, by the most strained construction, in favor of the plaintiff, the defendant's memorandum and letter state, that at some time the defendant agreed to buy of somebody 15,000 feet of clear rock maple boards of certain dimensions, to be delivered at the railroad track, at \$20 a thousand; and that, on the 21st day of December, 1867, the defendant inquired of the plaintiff by letter, whether he could get, for the defendant, 20,000 feet of the best maple lumber, the coming winter, saw it in the winter or spring, and deliver it at the depot at the plaintiff's place the next July—and at what price the plaintiff would do this. We do not think the legal import of this statement is, that the plaintiff is the person with whom the defendant contracted.

A memorandum (consisting of one or more writings) may be read, like other documents, in the light of the circumstances in which it was written, for the explanation of its latent ambiguities, and the application of its terms to the persons and things sufficiently described in it.

But this rule does not admit parol evidence to supply an essential part of the contract, the omission of which is patent on the face of the memorandum. And the inequitable operation of the statute is not to be avoided by a narrow construction of the law, or a liberal construction of the memorandum. Arguments from inconvenience and injustice sometimes tend to show the lawmakers' intention. But there is reason to fear, that in this country as well as in England, the favor with which some statutes, and the dislike with which others, have been regarded by courts have enlarged the distinction between strict and loose construction, without reference to the legislative intent, and introduced a variable standard that exposes the province of the legislature to judicial invasion.

Foster, J. did not sit.

Verdict set aside.

MEMORANDUM MUST BE MADE BEFORE ACTION IS BROUGHT

BIRD ET AL V. MUNROE

66 Me. 337 (1877).

PETERS, J. On March 2, 1874, at Rockland, in this State, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice to be delivered, by immediate shipments, to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day, (March 24,) by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10, or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiff's right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as an imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th of March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter, the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestae*. Benjamin on Sales, § 213; *Stoops v. Smith*, 100 Mass. 63, 66, and cases there cited.

Then the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only, and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d day of March and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date, (March 2,) although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2 or March 24? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said that any thing given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state the consideration for the promise is not required to be expressed in writing. *Gillighan v. Boardman*, 29 Maine, 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby, and the other not be. There may be mutuality of contract, but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs, and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it at the same time fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course perjury and fraud cannot be wholly prevented; but,

as said by Bigelow, J. (*Marsh v. Hyde*, 3 Gray, 331,) "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The locus penitentiae remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps most instances, such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is per se the contract of the parties. In many cases, as for instance like the antedating of the deed in *Egery v. Woodard*, 56 Maine, 45, cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to Rev. Sts. c. 111, §4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections, where it is provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit of law. But the distinction is without any essential difference, and is now so regarded by authors generally, and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (Rev. Sts. 1871, §4) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. (Rev. Sts. 1871, c. 136, §4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. *Browne*, St. Frauds, §115, 136,

and notes to the sections; Benjamin on Sales, §114; *Townsend v. Hargraves*, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend v. Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only, and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement, rather than the date of the part acceptance, was treated as the time when the contract was made, and the risk of the loss of the goods was cast upon the buyer. *Vincent v. Germond*, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster v. Zielly*, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, seems also to be an authority directly in point. *Thompson v. Alger*, 12 Met. 428, 435, and *Marsh v. Hyde*, 3 Gray, 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expression in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the strongest implication: such as that the statute does not apply where the contract has been executed on both sides, *Bucknam v. Nash*, 12 Maine, 474;—that no person can take advantage of the statute but the parties to the contract, and their privies; *Cowan v. Adams*, 10 Maine, 374;—that the memorandum may be made by a broker; *Hinkley v. Arey*, 27 Maine, 362; or by an auctioneer; *Cleaves v. Foss*, 4 Maine, 1;—that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale; *Davis v. Moore*, 13 Maine, 424; or several days after; *Bush v. Holmes*, 53 Maine, 417; or ever so long after; *Browne*, St. Frauds, § 337, and cases there noted;—that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained;

Haynes v. Nice, 100 Mass. 327;—that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract; Leroux v. Brown, 12 C. B. 801; but this case has been questioned somewhat;—that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received; Howard v. Sexton, 4 Comstock, 157;—that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; Maclean v. Dunn, 4 Bing. 722;—that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; Gale v. Nixon, 6 Cow. 445;—that the recognition of the contract may be contained in a letter, or in several letters if so connected by “written links” as to form sufficient evidence of the contract;—that the letters may be addressed to a third person; Browne, St. Frauds, § 346; Fyson v. Kitton, 30 E. L. & Eq. 374; Gibson v. Holland, L. R. 1 C. P. 1;—that an agent may write his own name instead of that of his principal, if intending to bind his principal by it; Williams v. Bacon, 2 Gray, 387, 393, and citations there;—that a proposal in writing if accepted by the other party by parol, is a sufficient memorandum; Reuss v. Picksley L. R. 1 Exc. 342;—that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; Dobell v. Hutchinson, 3 A. & E. 355;—that the written contract may be rescinded by parol, although many decisions are opposed to this proposition; Richardson v. Cooper, 25 Maine, 450;—that equity will interfere to prevent a party making the statute an instrument of fraud; Ryan v. Dox, 34 N. Y. 307; Hassam v. Barrett, 115 Mass. 256, 258;—that a contract verbally made may be maintained for certain purposes, notwithstanding the statute;—that a person who pay his money under it cannot recover it back, if the other side is willing to perform; and he can recover if performance is refused; Chapman v. Rich, 63 Maine, 588, and case cited;—that a respondent in equity waives the statute as a defence unless set up in plea or answer; Adams v. Patrick, 30 Vermont, 516;—that it must be specially pleaded in an action at law; Middlesex Co. v. Osgood, 4 Gray, 447; Lawrence v. Chase, 54 Maine, 196;—that the defendant may waive the protection of the statute and admit verbal evidence, and become bound by it; Browne, St. Frauds, § 135.

It may be remarked however, that in most courts a defendant may avail himself of a defence of the statute under the general issue. The

different rule in Massachusetts and Maine grew out of the practice act in the one state, and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton v. Kempster*, 5 Taunt. 786, 788 "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, *Jervis, C. J.* said "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McClellan v. McClellan* 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. *Willes, J.*, perhaps correctly describes it in *Gibson v. Holland*, *supra*, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character, to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." *Browne*, St. Frauds, §338; *Benjamin on Sales*, §159; *Fricker v. Thomlinson*, 1 Man. & Gr. 772; *Bradford v. Spyker*, 32 Ala. 134; *Bill V. Bament*, 9 M. & W. 36; *Philbrook v. Belknap*, 6 Vt. 383. In the last case it is said, "Strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it to enforce it."

Action to stand for trial.

A CONTRACT BASED ON A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER MUST BE IN WRITING

DEXTER V. BLANCHARD

See under Suretyship and Guaranty, page 105

L

A CONTRACT FOR THE SALE OF GROWING TREES IS AN
"INTEREST IN LAND"

STUART V. PENNIS

91 Va. 688 (1895)

RILEY, J. This was a suit in equity to compel the specific performance of a contract in writing for the sale of growing timber trees. Upon a demurrer to the bill, it was dismissed by the court.

There was, and could be, no objection urged against the relief sought, growing out of any indefiniteness as to the terms of the contract, or as to its subject matter. The defense of the appellee was that the subject of the contract was personal property, and not an interest in real estate; and being personal property, and there also being an adequate remedy at law for the breach of the contract, a court of equity would not specifically enforce it.

On the other hand, counsel for the appellant claimed that standing trees so pertain to the soil that a contract for their sale is, in law, a sale of an interest in land, and that under the general rule that a court of equity will always enforce, in a proper case, the specific performance of a contract for the sale of land (2 Minor, Inst. 867; Pom. Spec. Perf. § 10), such relief should have been granted in this case.

We have been cited by counsel to no decision of this court on this subject, and are ourselves aware of none. Our attention was called to the case of McCoy v. Herbert, 9 Leigh, 548, but an examination of it shows that the question in controversy here was not there raised or decided. The sole question there was as to the validity of an assignment of a contract of sale of certain trees standing in the woods, which had been bought for ship timber, and not whether the subject of the contract was an interest in land or chattels. There is scarcely any other subject upon which there is so great diversity of judicial decision. Whenever required to pronounce upon a contract for their sale, courts have seemed uncertain as to whether standing or growing trees should be classed as real or personal property. Not only have the courts of different jurisdictions decided differently, but the decisions of the same court within the same jurisdiction have not always been uniform. Particularly has this been the case with the courts of England, and their latest declaration on this question (Marshall v. Green, 1 C. P. Div. 35) has not escaped criticism from very high authority. Hirth v. Graham, 50 Ohio St. 57 (40 Am. St. R. 641), Benj. Sales (ed. 1892), § 126, and an article by Prof. Washburn (the learned author of the work on Real Property) published in the Albany Law Journal, and to be found in the note to

the case of *Turner v. Piercy*, 17 Am. Rep. 595. The decisions of the highest courts in the several States of the Union have also been greatly at variance with respect to this subject. It will be found, however, upon an examination of them, that the weight of authority preponderates in favor of the view that a contract for the sale of growing trees is a contract for the sale of an interest in land, and is to be so treated. *Hirth v. Graham*, supra; *Owens v. Lewis*, 46 Ind. 488 (15 Am. R. 295); *Green v. Armstrong*, 1 Denio, 550; *Slocum v. Seymour*, 36 N. J. Law, 138 (13 Am. Rep. 432); *Kingsley v. Holbrook*, 45 N. H. 313 (86 Am. Dec. 173); *Buck v. Pickwell*, 27 Vt. 157; *Harrell v. Miller*, 35 Miss. 700, Bish. Cont. ¶ 1294; and Washb. Real Prop. 366, 367.

Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land, just as the coal, the iron, the gypsum, and the building stone which enter so largely into the business commerce. Attached to the soil, they pass with the land, as a part of it. A conveyance of the land carries with it to the guarantee the right to the forests and trees growing upon it. In the dealings of men growing timber is ever regarded as a part of the realty. Upon the death of the ancestor, they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in or a part of the land, and must be so treated by the courts. We are better satisfied with the conclusion reached, in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind, of the section of the State whence this case comes, in whose development its people are becoming more largely engaged year by year.

For the foregoing reasons, we are of opinion that the court erred in sustaining the demurrer to the bill, and the decree complained must be reversed.*

*This is probably the law by weight of authority, although Connecticut, Kentucky, Maine, Maryland, and Massachusetts hold that a sale of growing trees to be immediately cut and removed by the purchaser, is a sale of personal property.—
EDITOR.

A MORAL OBLIGATION IS NOT A SUFFICIENT CONSIDERATION TO SUPPORT AN EXPRESS PROMISE

DANIEL MILLS v. SETH WYMAN

3 Pickering, Mass. 207 (1826)

This was an action of assumpsit brought to recover a compensation for the board, nursing, etc., of Levi Wyman, son of the defendant from February 5 to 20 1821. The plaintiff then lived at Hartford Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On February 24, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and Allen in support of the exceptions.

The opinion of the Court was read, as drawn up by

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientiae to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services toward the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay

the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preexisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligations to advance the interest

of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or Bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at sometime or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow that a promise founded upon such debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law,

which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 B. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the Court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the non-suit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

A CONTRACT FOR SERVICES IN PROMOTING A MARRIAGE IS VOID AS AGAINST PUBLIC POLICY

IN RE GROBE'S ESTATE

127 Iowa, 121 (1905)

MCCLAINE, J. The finding of facts by the trial court was that there was a contract between Mrs. Aldinger, the claimant, and the deceased, whereby the latter agreed to pay to the former \$200, if she would go to Chicago to see a woman whom he was desirous of marrying, and give her information concerning him, and that claimant went to Chicago in pursuance of the contract, and incurred certain expenses, all at the

request of deceased. The court allowed a portion of the claim, which was for money advanced, but denied recovery for compensation on account of services rendered, on the ground that the contract was a marriage brokerage contract, and void as against public policy.

It is well settled that no recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage. Advice and solicitation on the part of the third person with reference to entering into the important relation of marriage are presumed to be given from considerations affecting the interest of the parties themselves, and not for pecuniary reward. It is contrary to public policy to make such advice or solicitation the basis of an agreement to pay money. And the rule is equally applicable to advice or solicitation with reference to carrying out a marriage contract, as it is with reference to the formation of such contracts. "The freedom of choice is essential to a happy marriage; and the voluntary selection by each spouse of the person who is to be his companion for life, with all that is implied in the relation of marriage; are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to the agreement of marriage to carry it into effect, if he has once been disposed to abandon it, as to endeavor to bring about such an agreement between parties who do not sustain any relation to each other." *Morrison v. Rogers*, 115 Cal. 252.

It does not clearly appear in the present case whether the deceased had already a contract of marriage with the woman in Chicago, which he desired the claimant to assist him in bringing about, or whether he was seeking to induce her to enter into a contract of marriage with him. But it is wholly immaterial what was the prior relation between the parties. It is clearly shown that the services to be rendered by claimant under her agreement with deceased, and for which she desires compensation, were to give to the woman whom deceased wished to marry information concerning him which would tend to induce the woman to enter into such marriage relation, and argument is necessary to demonstrate that this arrangement was a marriage brokerage contract, pure and simple—such as is deemed by the law to be against public policy, and therefore void. *Duval v. Wellman*, 124 N. Y. 158; *Fuller v. Dame* 18 Pick. (Mass.) 472, 481; *Morrison v. Rogers*, *Supra*; 2 *Pomeroy*, *Equity*. Paragraph 932.

The judgment of the lower court is affirmed.

A CONTRACT IN RESTRAINT OF MARRIAGE IS VOID

STERLING V. SINNICKSON

2 Southard 5 N. J. L., 756 (1820)

Declaration in debt on a sealed bill, which was as follows:

"I, Seneca Sinnickson, am hereby bound to Benjamin Sterling, for the sum of one thousand dollars, provided he is not lawfully married in the course of six months from the date hereof. Witness my hand and seal. Burlington, May 16, 1816.

"SENECA SINNICKSON (Seal)

"Witness, James S. Budd."

Defendant demurred generally, and plaintiff joined in demurrer.

KIRKPATRICK, C. J. . . . The contract was not only useless and nugatory, but it was contrary to the public policy.

Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement.

If these parties had entered into mutual obligations, the plaintiff not to marry within six months, and the defendant to pay him therefor this sum of \$1000, there can be no doubt, I think, but that both the obligations would have been void. In the case of *Baker v. White* (2 Vern 215), A gave her bond to B for £100 if she should marry again, and B gave her his bond for the same sum, to go towards the advancement of her daughter's portion, in case she should not marry. It was, as Lord Mansfield says in *Lowe v. Peers* (Bur. 2231), a mere wager, and nothing unfair in it; and yet A was relieved against her bond, because it was in restraint of marriage, which ought to be free. A bond, therefore, to marry, if there be no obligation on the other side, no mutual promise, or a bond not to marry, are equally against the law. They are both restraints upon the freedom of choice and of action, in a case where the law wills that all shall be free. If the consideration for which this money was to be paid, then, was the undertaking of the plaintiff not to marry, that consideration was unlawful. He would have been relieved against it, either at law or in equity; and if so, the corresponding obligation to pay, according to the principle above stated, is void.

It has been spoken of by the plaintiff, as if it were an obligation to pay money upon a future contingency, which any man has a right to make, either with or without consideration, and as if the not marrying

of the plaintiff were not the consideration of the obligation, but the contingent event only, upon which it became payable. But I think this is not the correct view of the case. Where the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not therefore, to be considered as a mere contingency, but as a consideration, and it must be such consideration as the law regards.

Nor does it at all vary the case that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance, on his part, help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning. Therefore, in my opinion, let there be judgment for the defendant.

Judgment for the defendant.

REASONABLE AGREEMENTS IN RESTRAINT OF TRADE ARE LEGAL

OREGON STEAM NAVIGATION COMPANY V. WINSOR

20 Wal. (U. S.) 64 (1874)

The Oregon Steamship Company owed Winsor \$75,000, as stipulated damages for breach of contract. In 1864 the California Steam Navigation Company being engaged in steam and other transportation on the several routes of travel on rivers, bays, and waters of California, sold the plaintiff (the Oregon Steam Navigation Company) which was engaged in a like business on the Columbia River, the steamer "New World" for \$75,000, subject to a stipulation that the company should not run the said steamer on the rivers of California for a period of ten years.

On February 18, 1867, the Oregon Steamship Company sold the same steamer to Winsor subject to the stipulation that the steamer should not be run on the waters of California or the Columbia River, and that on a breach of said covenant the vendees should pay \$75,000 as actual liquidated damages. Winsor was engaged in the navigation business on Puget Sound. He used the steamer on the waters of California and the Oregon Steamship Company brought this suit. Defendant demurred. The demurrer was sustained and the suit dismissed. Plaintiff brought the case to the supreme court on a writ of error.

BRADLEY, J. It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. Chit. Cont. 576, 8th Am. ed. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Id.* Tindal, Ch. J., in *Horner v. Graves*, 7 Bing. 743. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. 2 Wms. Saund. 156, note I. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

The application of the rule is more difficult than a clear understanding of it. In this country especially, where state lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular state is or is not within the rule. It has generally been held to be so on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation. *Taylor v. Blancard*, 13 Allen (Mass.) 375; *Dunlop v. Gregory*, 10 N. Y. 241.

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the articles in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded

from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

To apply these principles to the case before us; the California Steam Navigation Company, being engaged in the business of transportation on the rivers, bays and waters of California, was willing to sell one of their steamers to the Oregon Steam Navigation Company, which was engaged in similar business on the Columbia River and its tributaries, provided, the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the first day of May, 1864. This stipulation was necessary to protect the

former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business to both companies, and that it promoted the general interests of commerce on the Pacific coast.

Judgment reversed.

DISCHARGE OF CONTRACTS

ANDERSON V. MAY

50 Minn., 280 (1892)

Appeal by defendant, L. L. May, from an order of the District Court of Ramsey County, Kelly, J., made January 2, 1892, refusing a new trial.

The plaintiff, G. W. Anderson, was in the business of raising and selling seeds at Red Wing, Minn. On March 7, 1890, May, a seedsman at St. Paul, ordered 591 bushels of beans of different varieties, to be raised by Anderson and delivered to May at St. Paul by November 15, 1890. After some correspondence as to price and seed and time of delivery, the order was accepted. Anderson delivered but 152 bushels and brought this action to recover \$287.66 the price, less \$63.14, the value of seed he had received from May.

The defendant answered setting up the contract and plaintiff's failure to perform, and claimed \$1,100 damages. At the trial plaintiff contended that he was excused from performance on the ground that an early and unusual frost in the month of September had destroyed most of his crop, and for that reason he was unable to furnish the full amount of beans ordered. He contended that he was thus without fault on his part prevented from performing, by the act of God. The jury gave plaintiff a verdict for \$234.80. Defendant moved for a new trial, and being denied, appealed.

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15 certain quantities of specified kinds of beans, and that he failed to do so except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should

raise that year from his market gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds and quality of beans specified—a contract in its nature possible of performance.

As an excuse for not delivering the entire quantity contracted for the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within control of the party." An application of this rule is furnished by *Cowley v. Davidson*, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in *Hawell v. Coupland*, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on

the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimation whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in *Adams v. Nichols*, 19 Peck. 275, 279; *School Dist. v. Dauchy*, 25 Conn. 530; and *Trustees v. Bennett*, 27 N. J. Law 513, approved and followed in *Steas v. Leonard*, 20 Minn. 494. Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

Order reversed.

DESTRUCTION OF SUBJECT MATTER EXCUSES PERFORMANCE

DEXTER v. NORTON

See under Sales, page 165

BUYER'S INABILITY TO PERFORM CONDITIONS REQUIRED TO RETURN PROPERTY WILL DEFEAT HIS OPTION TO RETURN IT

BAY v. THOMPSON

12 Cushing (Mass.) 281 (1853)

Assumpsit for the price of a horse sold to defendant. Defense, sale on condition that defendant might return the horse, and that he had returned it. Verdict for defendant.

Plaintiff offered to prove that defendant had so abused the horse that it was materially injured and lessened in value and the plaintiff had refused in consequence to receive it back. This evidence was excluded and plaintiff excepted to the ruling.

BY THE COURT. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an indebitatus assumpsit, without setting out the conditional contract. *Moss v. Sweet*, 3 Eng. Law & Eq. 311; 16 Ad. & El. N. S. 493.

New trial ordered.

WHERE A COMPENSATION IN DAMAGES IS NOT AN ADE-
QUATE REMEDY A COURT OF EQUITY WILL GRANT
A DECREE OF SPECIFIC PERFORMANCE IN
THE CASE OF PERSONAL PROPERTY
THE SAME AS IN REAL ESTATE

P. AND F. CORBIN V. TRACEY

34 Conn. 325

Bill in equity brought to compel the specific performance of a contract to assign a patent right. Decree in favor of the petitioners.

CARPENTER, J. . . . "Under the motion in error, it is objected that the petitioners have not made out a case for the interference of a court of equity; that courts of equity in this state will not interfere to enforce agreements to sell personal property unless the circumstances are such as to make a trust, because there is in such a case a remedy at law by an action for damages.

"The objection assumes that there is a distinction in questions of this character between real and personal property. If any such distinction exists it does not go to the extent claimed.

"The ground of the jurisdiction of a court of equity in this class of cases, is, that a court of law is inadequate to decree a specific performance and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which the situ-

ation might require. Whenever, therefore, the party wants the thing in specie and he cannot otherwise be fully compensated courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of the land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story's Eq. Jur. secs. 717, 718.

"The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not, in the particular case, afford a complete remedy. 1 Story's Eq. Jur. sec. 716, 717, 718, and cases there cited; *Clark v. Flint*, 22 Pick. 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Parson on Contract (5th Ed.) 373.

"An application of these principles to the case before us, relieves us of all difficulty. The contract relates to a patent right the value of which has not been tested by actual use. All the data by which its value can be estimated are yet future and contingent.

Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand it may be so simple in its principles and construction as to defy all competition and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time, and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole we are satisfied that justice can only be done in a case like this by a specific performance of the contract.

There is no error in the decree.

CONTRACTS TO BE PERFORMED TO THE OTHER PARTY'S
SATISFACTION

BROWN V. FOSTER

113 Mass., 136 (1873)

Contract to recover the price of a suit of clothes.

At the trial in the Central District Court of Worcester, the defendant contended, and there was evidence tending to show, that the clothes were to be made and delivered to the defendant in North Brookfield, on or before a specified day, and that they were to be made to the satisfaction of the defendant.

It was agreed that the clothes were delivered on the evening of the day specified, which was Saturday, and that on the following Monday the defendant returned them to the plaintiff by the same person who delivered them, with written notice that the clothes did not fit, were unsatisfactory, and were not accepted.

The defendant offered evidence that the clothes did not fit him, and that they were not made in the manner and form agreed upon. While the defendant was testifying, the plaintiff produced the clothes in Court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and, having put them on, wore them in the presence of the Court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations, before they could be called a good fit, but that such alterations could be easily made without injury to them. He also offered evidence that he wrote a letter to the defendant the same day the clothes were returned, in which the following language was used: "Can't you come and let us see what the trouble with the fit of your clothes is? From what you say about the coat we think we could remedy that, and we could make another vest if necessary, and coat too." To this letter the defendant replied that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made.

There was evidence that the defendant came to the plaintiff's store soon after the clothes were returned, and the plaintiff asked him to try them on to see what alterations, if any, were necessary to make them fit; this the defendant refused to do.

There was also evidence to show that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations which might be necessary to make them fit.

The defendant asked the Court to give the following instructions to the jury.

"1. If you find that the plaintiff agreed to make the clothes in question to the satisfaction of the defendant and failed so to do, then the plaintiff cannot maintain this action, and you will return a verdict for the defendant.

2. If you find that the plaintiff agreed to deliver the clothes on or before a specified time, made up in the manner and form agreed upon, and failed to do so, then the defendant was under no obligation to accept them, and you will return a verdict in his favor."

The court refused to give the instructions in the form prayed for, but after giving instructions upon the other points raised, to which no objections were made, instructed the jury as follows:

"The plaintiff was bound to make the clothes of the material ordered, in a workmanlike manner, and to deliver them at the time agreed upon by the parties. If the plaintiff agreed to make the clothes to the satisfaction of the defendant, he was bound to do so, with these qualifications: If, when the clothes were delivered, there were defects in the fit of them such as are liable to occur in first-class tailoring establishments, but such as could be easily remedied, and a custom among tailors has been proved to remedy such defects when they occur, the plaintiff was entitled to a reasonable opportunity therefor, and if he was willing and offered to remedy said defects, and the defendant refused to allow him to do so, the plaintiff is entitled to recover if the other facts in the case are proved."

The jury returned a verdict for the plaintiff, and the defendant excepted.

DEVENS, J. There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensa-

tion of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. *McCarren v. McNulty*, 7 Gray, 139.

When an express contract like that shown in the present case was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect. *Dickinson v. Gay*, 7 Allen 29, 31. The evidence admitted was of this description.

Exceptions sustained.

WHERE THE WORK TO BE DONE IS NOT TO GRATIFY TASTE·
SERVE PERSONAL CONVENIENCE, OR SATISFY INDIVID-
UAL PREFERENCE, BUT IS OF A MECHANICAL NATURE,
THE PARTY FOR WHOM IT IS DONE MUST PAY FOR THE
WORK IF IT IS A SUCCESS, ALTHOUGH HE MAY CLAIM
THAT HE IS NOT SATISFIED

DUPLEX SAFETY BOILER COMPANY V. GARDEN

101 N. Y., 387 (1886)

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made February 12, 1884, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a contract, the nature of which, and the material facts are stated in the opinion.

John A. Deady for appellants. Whether defendants were satisfied that the boilers as repaired were a success or not was, under the contract, for defendants alone to decide, and it was incumbent upon plaintiff to show they were so satisfied. *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113, Mass. 136; *Taylor v. Ames*, 6 Lans. 280; *Gray v. Cent. R. R. Co. of N. J.* 11 Hun, 70; *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Rich v. Milk*, 29 Barb. 516; *Hall v. Simpson*, 19 How. Pr. 481; *Farrell v. Hildreth*, 38 Barb. 178.

H. C. Place for respondent.

DANFORTH, J. The plaintiff sued to recover \$700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defence set up was that the work was done under a

written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff: "You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by 10th of May next. For above changes we are to pay you \$700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by May 10, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must, of course, accord, with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In *Folliard v. Wallace*, 2 Johns. 395, W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the Court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in *City of Brooklyn v. City R. R. Co.*, 47 N. Y. 475, and *Miesell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 115.

In the case before us the work required was specified, and was com-

pleted; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agrees—whether it shall be accepted. Such instances are cited by the appellants.

One who makes a suit of clothes (*Brown v. Foster*, 113 Mass. 136), or undertakes to fill a particular place as agent (*Tyler v. Ames*, 6 Lans. 280), mould a bust (*Zaleski v. Clark*, 44 Conn. 218), or paint a portrait (*Gibson v. Cranage*, 39 Mich. 49; *Hoffman v. Gallaher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it, no error has been shown.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

LEGAL IMPOSSIBILITY

CORDES V. MILLER

39 Mich., 581 (1878)

Assumpsit on covenant in a lease. Defendant brings error.

COOLEY, J. Miller, on the fourth day of October, 1872, rented of Cordes, for the term of ten years, a wooden building in Grand Rapids, at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time, for said Miller." Miller went into possession and occupied the building for a restaurant and saloon until May 26, 1874, when it was destroyed by fire. Within a week Miller notified Cordes to rebuild, and some preparation to do so would appear to have been made by the removal of the debris of the fire. June 15, 1874, the common council of Grand Rapids passed an ordinance prohibiting the erection of wooden buildings within certain limits which embraced the site where the burned building had stood. Cordes afterwards went on and prepared plans and specifications for

a larger brick building, and contracted for putting it up. Miller declined to examine the plans or to say anything about them, but in substance he said that when the building was completed he would move into it. It was completed in November, and in December Miller moved into a part of it, which was considered by the parties as being equivalent to the old building. Complaining then that the new building was not put up in a suitable time, he brought this suit on the covenant.

The principal question in the case is whether such a suit can be maintained. No question is made of the validity of the city ordinance, and it is urged on behalf of the lessor that as the putting up of such a structure as was originally leased was thereby rendered impossible, the covenant was discharged. *Brady v. Insurance Co.*, 11 Mich. 425. On the other hand, it is argued that rebuilding is not impossible; it is only rebuilding of a specified material that is forbidden; and that Cordes, when he rented his building and agreed to rebuild in case of fire, took upon himself all the risks of being compelled to make use of some other material than wood, as much as he did the risk of the rise in the cost of material. Some stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of more substantial material than wood, no matter how much greater might be the cost, and to turn it over to Miller for the term at the same rent, no matter how much more the occupation might be worth. Moreover, he would be obliged to reproduce the old building, as near as the change in material would permit, and could not compel his lessee to accept a building differently planned, subdivided, and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone, or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased; but did not covenant that if not allowed to rebuild that, he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in place

of the one leased, and to receive for it the same rent the wood building brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or a stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal; and his covenant has thereby been discharged.

In this case Cordes prepared accommodations for Miller which the latter has accepted and now occupies. But they were different from the old, and Miller could not have been compelled to accept them. The arrangement was therefore one outside the lease,—not one in compliance with its terms. Probably the course of the parties has in effect been equivalent to an offer on one side and an acceptance on the other of the new quarters in place of the old and under the old lease; but no question concerning that arrangement arises here.

The judgment must be reversed, and judgment entered for Cordes with costs of both courts.

The other justices concurred.

INJUNCTION AGAINST BREACH OF CONTRACT

PHILADELPHIA BALL CLUB V. LAJOIE

202 Pa. 210 (1902)

Bill in equity to enjoin defendant from furnishing his services as a ball player to a rival baseball organization. Appeal by plaintiff from a decree dismissing his bill for an injunction.

POTTER J. The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other clubs. He violated his agreement, however during the term of his engagement, and in disregard of his contract, arranged to play for another and a rival organization.

The plaintiff by means of this bill sought to restrain him, during the period covered by the contract.

The court below refused an injunction, holding that to warrant the interference prayed for, "the defendant's services must be unique,

extraordinary and of such character to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the court the defendant's qualifications did not measure up to this high standard. . . .

We think however that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace them he has taken extreme ground. . . .

The court below finds from the testimony that, "the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it as would the withdrawal of any good player, and would probably make a difference in the size of the audience attending the game."

We think thus stating it, he puts it very mildly and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert player. He had been for several years in the service of the plaintiff's club, and has been reengaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club and his own work was peculiarly meritorious as an integral part of the team work which is so essential. In addition to these features which render his services of peculiar and special value to the plaintiff and not easily replaced, Lajoie is well known and has a great reputation among the patrons of the sport for the ability in the position which he fills, and thus the most attractive drawing card for the public. He may not be the sun in the baseball firmament but he is certainly a bright particular star.

We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce irreparable injury in the legal significance of that term to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate remedy of loss and the case therefore properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining its breach. The court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for any other club in violation of his agreement.

Reversed.

AN INJUNCTION WILL BE GRANTED TO PREVENT THE
BREACH OF A CONTRACT FOR UNIQUE OR EXTRA-
ORDINARY PERSONAL SERVICES BUT NOT
WHERE THE SERVICE IS LARGELY
MECHANICAL

CORT V. LASSARD, ET AL.

18 Ore., 221 (1889)

LORD, J. This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants were to perform as acrobats, exclusively for the plaintiff, during a period of six weeks, at a salary of \$60 per week, etc., that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc.; that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception; "That the performance of the said defendants was not of an unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: (1) That it is immaterial whether the performance is unique, or involves special knowledge or skill; and (2) that the finding

is contrary to the evidence, which will show that the performance was unique and unusual. In this case, there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. *Kemble v. Kean*, 6 Sim. 333. But this case was expressly overruled in *Lumley v. Wagner* (1 De Gex, M. & G. 604) upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the Lord Chancellor said:

"The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract, and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform

at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered."

In *Montague v. Flockton* (L. R. 16 Eq. 189) it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. Referring to *Lumley v. Wagner*, *supra*, the Vice-Chancellor said.

"It happened that the contract did contain a negative stipulation and finding it there, Lord St. Leonard relied upon it; but I am satisfied that, if it had not been there, he would have come to the same conclusion, and granted the injunction on the grounds the *Mdlle. Wagner*, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point."

As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until *Daly v. Smith* (49 How. Pr. 150) was decided, the doctrine of *Lumley v. Wagner*, *supra*, was either entirely rejected or only partially accepted. *Sanguirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 528; *Fredericks v. Mayer*, 13 How. Br. 566; *Butler v. Galletti*, 21 How. Pr. 465; *Burton v. Marshall*, 4 Gill, 487; *Hayes v. Willio*, 11 Abb. Pr. (N. S.) 167. In that case (*Daly v. Smith*, *supra*) the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with *Lumley v. Wagner*, *supra*. See also *Hahn v. Society*, 42 Md. 465; *McCaull v. Braham*, 16 Fed. Rep. 37. In *Fredericks v. Mayer* (13 How. Pr. 567) and *Butler v. Galletti* (21 How. Pr. 466) the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, whose performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained, for the fact is that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar; and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places, or in obtaining from others the same service, as would happen with actors whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the application of the preventive remedy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in *Daly v. Smith*, *supra*, upon which relief was granted, although the opinion is broad enough to include contracts without such stipulations, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages.

"Where," says Professor Pomeroy, "a contract stipulates for a special, unique, or extraordinary personal service or acts, or for such services or acts to be rendered or done by a person having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same, or the same kind of services or acts elsewhere, or by employing any other person." Pom. Eq. Jur., par. 1343.

Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market, as in the case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense. But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique or of any special merit. The plaintiff himself will not even admit that they are: while others say the performances were "great," "pretty good," "do a fair act," etc.; and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows a relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

CUSTOMS AND USAGES IN INTERPRETING A WRITTEN CONTRACT

WALLS V. BAILEY

49 N. Y. 464

Suit brought to recover a balance alleged to be due to plaintiffs for plastering defendant's house. The work was done under a written contract with prices based on so much per square yard. Plaintiffs did the work and charged defendant for the work done without deducting for cornices, base boards, doors or windows, claiming that it was a general custom not to deduct such spaces in determining the amount of space covered. Verdict for the plaintiffs.

FOLGER, J. "The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house calling it solid, with no allowance for the openings by windows and doors?

"And it is not to be said of this contract, that it was so plain in its terms as that there could be but one conclusion as to the mode of measurement, by which the number of square yards of work should be arrived at. It is in this case as it was in *Hinton v. Locke* (5 Hill, 437). There the work was done at so much per day. The parties there differed as to how many hours made a day's work. That is, what should be the measurement of the day? And there, evidence of the usage was admitted, not to control any rule of law, nor contradict the agreement of the parties, but to explain an ambiguity in the contract. And the proof showing a usage among carpenters that the day was to be measured by the lapse of ten hours. It was held a valid usage; and the contract was interpreted in accordance with it. . . .

"So in the case before us. How shall the number of the square yards of work done be ascertained, is not so determinately reached by the language of the contract as that the law can say there was but one method in the minds of the parties, and this is it.

"And from the case above cited, it appears that the meaning of words may be controlled and varied by usage; even when they are words of number, length or space, usually the most definite in language.

"Every legal contract is to be interpreted in accordance with the

intention of the parties making it. And usage (with a limitation hereafter noticed), when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties.

Starkie on Evidence 637, 710, Williams v. Gilman, 2 Greenl, 276. Parties are held to contract in reference to the law of the state in which they reside. For all men, being bound to know the law, are presumed beyond dispute, to contract in reference to it. And so they are presumed to contract in reference to the usage of the particular place or trade in or as to which they enter into agreement. . . . When it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. (2 Parsons on Cont. p. 541 and cases cited.)

"The jury in the case before us, have found the existence of the usage contended for by the plaintiffs, and upon evidence which well sustains the finding. The same evidence shows that the usage was uniform, continuous and well settled. Nor was it one which was in opposition to well settled principles of law, or which was unreasonable. . . .

"It would seem, however, that upon principle, for a party to be bound by a legal usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. (Id.) For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with, an existing usage. Usage is engrafted upon a contract or invoked to give it meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be part of their contract wherever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. (See Rushforth v. Hadfield, 7 East, 224). There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances from which it may be inferred or presumed that they had reference to it. (Redfish v. Fox, *supra*, p. 96.)" . . .

Judgment reversed.

A LAW IMPAIRING THE OBLIGATION OF A CONTRACT IS VOID

THE TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD

4 Wheaton, 518 (1819)

MARSHALL, C. J., delivered the opinion of the court, as follows:

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supple-

and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?
2. Is it impaired by the acts under which the defendant holds?

(It was claimed that the funds of the college were public property, and the act of incorporation was a grant of political power. In regard to this the court said:)

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land on

consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth and any others," the charter was granted, and the Trustees of Dartmouth College were by that name created a body corporate, with power, for the use of said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In cases of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. . . .

- Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds are drawn, for its foundation is purely private and eleemosynary,—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if

the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? . . .

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but charity school, or a seminary of education, incorporated for the preservation of its property, and the preperpetual application of that property to the objects of its creation. . . .

The opinion of the court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing

tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation. . . .

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

ADDITIONAL CITATIONS IN CONTRACTS

I. Offer and acceptance.

1. Offer by Circular.

Spencer v. Harding

L. R. 5 C. P 561

2. Vote of Commissioners Accepting a Bid is not an Offer of a Contract.

Edgemoor Bridge Works v. County of Bristol

170 Mass. 528

3. The Performance of What a Public Offer Requires, Without Knowledge of the Offer, is not an Acceptance of the offer.

Broadax v. Ledbetter

100 Texas 375

1. An Unacquainted Offer can not Form the Basis of a Contract.

Fitch, et al. v. Snedaker

38 N. Y. 248

Royal Insurance Company v. Beatty

119 Pa. St. 6

5. An offer may be Revoked at any Time Before Acceptance.

Fisher v. Seltzer

23 Pa. St. 308

6. An Offer Under Seal is Irrevocable.

McMillan v. Ames

33 Minn. 257

Aller v. Aller

40 N.J. L. 446

7. When an Offer has been Accepted It Can not be Withdrawn.
Wheat v. Cross
31 Md. 99
8. Death Terminates an Offer
Jordan v. Dobbins
122 Mass. 168
9. An Acceptance Must be Communicated in Order to be Binding.
Prescott v. Jones
69 N. H. 305
41 Atlan. 352
10. Where an Offer Asks for the Sending of a Check for the Premium to Perfect an Insurance Policy, the Sending of the Check Binds the Company.
Taylor v. Merchant's Ins. Co.
50 U. S. 390
11. When an Offer may be Revoked.
Brown v. San Francisco Sav. Union
134 Cal. 448
12. Silence When it is not a Man's Duty to Speak, is not an Acceptance.
Royal Insurance Co. v. Beatly
119 Pa. 6
12 Atlan 607
13. Where an Offer Specified that the Acceptance Should be Sent "By Return of Wagon," an Acceptance by Letter is not a compliance and no Contract Results.
Eleason v. Henshaw
17 U. S. 225
4 Wheaton (U. S.) 225
14. An Acceptance Takes Place from the Time it is Posted.
Henthorn v. Fraser
2 Chancery 27
Adams v. Lindsell
1 B. & Ald. 681
Washburn v. Fletcher
42 Wis. 152
15. An Offer or its Acceptance may be made either by Words or By Conduct.
Fogg v. Portsmouth Athenaeum
44 N. H. 115

II. Competency of Parties.

1. An Infant's Contract is Voidable
 Course v. Wyerhauser
 69 Minn. 328
2. An Infant Can not Disaffirm a Conveyance of Real Estate
 Before Reaching His Majority.
 Welch v. Bunce
 83 Ind. 382

III. Consideration.

1. A Past Consideration Will not Support a Promise.
 Roscorla v. Thomas
 3 Q. B. 234
2. A Moral Obligation is not Sufficient to Support a Promise.
 Cook v. Bradley
 7 Conn. 57
3. Signing a Subscription Paper and Pledging \$5,500 to a Church
 on Condition that \$45,000 should be Raised by the
 Trustees to Pay Off a Mortgage, is Void for Want of
 Consideration, where the Trustees make No Effort to
 Raise the \$45,000, and do not incur any obligations on
 the Strength of the Subscription.
 Presbyterian Church v. Cooper
 112 N. Y. 517
 20 N. E. 352
4. An Architect was Under Contract to Superintend the Erec-
 tion of a Brewery, but Refused to carry out the agree-
 ment, because the Owner Hired Another to Superintend
 the Ice Plant. The Owner then Offered the Architect
 5% of the Cost of the Ice Plant to Finish Superintend-
 ing the Construction of the Brewery. The Owner's
 Promise is void for want of Consideration, as the Archi-
 tect was only doing what he was Already Legally Bound
 to do.
 Lingenfelder v. Wainwright Brewing Company
 103 Mo. 578
 15 S. W. 844

FORM OF A CONTRACT OF SALE

BIRD, ET AL. V. MUNROE

See under Contracts, page 99

WHETHER A SALE IS COMPLETE OR NOT DEPENDS ON
THE INTENTION OF THE PARTIES

LINGHAM V. EGGLESTON

27 Mich. 324 (1873)

COOLEY, J. The contest in this case relates to a sale of lumber by Eggleston to Lingham and Osborne, and the question involved is, whether the contract between the parties amounted to a sale in presenti and passed the title, or merely to an executory contract of sale. The lumber, subsequent to the contract, and before actual delivery to the purchasers, was accidentally destroyed by fire, and the purchasers now refuse to pay for it, on the ground that it never became their property. The action was brought by Eggleston for goods bargained and sold, and in the court below he recovered judgment.

There appears to be very little dispute about the facts. The lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber the plaintiff had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000, excluding Robinson's share in the four or five piles. The defendants went to the mill yard September 23, 1871, and proposed to buy the lumber. Plaintiff went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After examining the whole to their satisfaction, the defendants agreed upon a purchase, and the following written contract was entered into:—

Flint, September 23, 1871.

Lingham and Osborne bought from C. Eggleston this day, all the pine lumber on his yard at Birch Run at the following prices; For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid as follows: five hundred dollars to-day, and five hundred dollars on the 10th of October next; the balance, one half on the 1st day of January, A. D. 1872, and the rest on the 1st day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham and Osborne, which shall not be later than 10th of November next. Also some shingles at two dollars per M. for No. 2, and four dollars for No. 1.

(Signed) LINGHAM & OSBORNE.

CHAUNCEY EGGLESTON, JR.

The \$500 mentioned in this contract to be paid at the time of its execution was paid. A few days later defendants went to the mill yard in plaintiff's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected, or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber,—the defendants claiming that such was the fact. On the 9th day of October, 1871, Lingham met plaintiff on the cars at Flint, and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; plaintiff took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham:—

Mr. Eggleston: You may load, say ten thousand, if you think best, on each car, and we can have it inspected as it is unloaded. I will try and come up to-morrow.

When plaintiff reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Such are the undisputed facts in the case; and upon these the jury were instructed in substance that a completed contract of sale was made out, and the plaintiff was entitled to recover the purchase price.

Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory, must usually be determined upon the intent of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive. . . .

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong, if not conclusive, evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is that of *Young v. Mathews*, Law R., 2 Exch. 127, where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The court held that the question was one of intention merely, and that it was evident the parties intended the title to pass. To the same effect are *Woods v. Russell*, 5 B. & Ald. 942; *Riddle v. Varnum*, 20 Pick 280; *Bates v. Conklin*, 10 Wend. 389; *Olyphant v. Baker*, 5 Denio, 379; *Bogy v. Rhodes*, 4 Greene (Iowa), 133; *Crofoot v. Bennett*, 2 N. Y. 258; *Cunningham v. Ashbrook*, 20 Mo. 553.

So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid, are still to be determined by the vendee. *Turley v. Bates*, 2 H. & C. 200; *Kohl v. Lindley*, 39 Ill. 195.

And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding. *Whitcomb v. Whitney*, 24 Mich. 486; *Terry v. Wheeler*, 25 N. Y. 520.

But the authorities are too numerous and too uniform to justify citation, which hold that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted. . . .

What, then, are the facts in this case from which the intent of the parties is to be inferred? The lumber was specifically designated so that no question of identity could arise. It was not delivered, and the vendor was to place it on board the cars, if desired to do so, within a time specified; but as in any event the vendees were to take it at Birch Run, and it was optional with them to load it on the cars themselves or to have the vendor do it for them, and they had no right to require that

he should do so after the day named, we think the circumstances that actual delivery was not made is not one of very much importance in the present discussion. What is of more importance is, that neither the quality nor the quantity was determined; and the evidence in the case shows that as to these there might very well be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained; and could not be until the qualities were separated and and measurement had.

It will be observed that the contract did not provide how or by whom the inspection and measurement should be made. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate and we must suppose such was the intent, unless something clearly appears in the case to show the contrary. Nothing of that nature appears in the record except the disputed evidence of defendants, that a person was agreed upon for the purpose. The note sent by Lingham to Eggleston, proposing that the eight cars be loaded and that the vendees make the proper inspection, was a mere proposition, and never acted upon. It is very evident Eggleston was under no obligation to trust this important transaction exclusively to the vendees, and we have no right to infer that he would have done so. It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title,—nothing to the contrary appearing,—the court should have so instructed the jury. The instructions given were in substance directly to the contrary.

It follows that the judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

WHERE THE PROPERTY SOLD HAS BEEN INSPECTED AND APPROVED AND IS A PART OF A LARGER BULK OF THE SAME KIND AND QUALITY AND THE PURCHASE PRICE IS PAID, THE FACT THAT THE PART SOLD HAS BEEN SEPARATED FROM THE REST, WILL NOT PREVENT THE TITLE FROM PASSING IF THE PARTIES SO INTEND

HURFF V. HIRES

40 N. J. L. 581 (1878)

Hurff, the plaintiff in error, in the fall of 1873, purchased of one Heritage two hundred bushels of corn, out of a lot of four or five hun-

dred bushels which Heritage had in his crib house. He inspected and approved of the corn before he bought it, and paid cash for it immediately on the purchase. The arrangement between Hurff and Heritage was, that the corn should be left where it was until it should get hard enough to keep well in bulk, and then Heritage was to deliver it. In January, 1874, Hires, as sheriff of the county of Salem, by virtue of an execution against Heritage, levied on the entire quantity of the corn as his property. After the levy, Heritage delivered two hundred bushels of the corn to the defendant, whereupon, the sheriff brought trover against him.

* * * * *

DEPUE, J. . . . The corn was purchased by Hurff, and paid for in good faith before the execution was issued. It was lying in the bulk, unseparated, when the levy was made, and, after levy, was separated from the mass, and delivered by the vendor. The case was tried in the court below on the theory that, though the purchaser bought the corn and paid the price, the title did not pass to him, because the quantity sold was not separated from the original bulk until after levy, and that, therefore, the whole still remained liable to seizure as the property of the vendor.

If the property had remained in bulk, the quantity purchased never having been separated from the mass, the purchaser might not have been able to maintain replevin, for the reason that in replevin the plaintiff must be the owner of the specific chattels he sues for, and must describe them in his writ. *Scudder v. Worster*, 11 Cush. 573. But that does not solve the question involved in this case. May not a party who had bought and paid for a specified quantity or number of articles from a larger mass, identical in kind and uniform in value, maintain trover against a third person who converts the whole, or defend in trover brought by an officer levying on the whole as the property of the vendor when a separation of the quantity he was entitled to under his purchase has been made under levy, and possession thereof has been delivered to him?

* * * * *

The question whether the property has passed under a contract of sale, has generally arisen where the right of an unpaid vendor is in issue. Payment of the price is so essential an ingredient of a sale that neither in law nor in morals is the buyer entitled to have the goods until he pays for them. The lien of the vendor is waived where payment is to be made at a future day, or there has been a delivery actual, and in some cases merely constructive: hence the inclination of the courts to hold, on slight circumstances, that the contract is so incomplete that a transfer

of title was not intended where the delivery is constructive only, and the insolvency of the buyer has intervened with the contract price unpaid. Prominent, also, among the cases in the same direction, are those in which the right of the purchaser to object to the quality of the article, which is the subject-matter of the contract of sale, is involved. Here, also, there is an inclination to hold the title to be in abeyance, if any well grounded objection to quality is apparent. A contract for the delivery of goods, merely of a particular description, is necessarily executory; and where it relates to a certain quantity from a large bulk, not uniform in quality or value, the transaction is so incomplete that until selection, and not mere separation, is made, the rights of the parties respectively are undefined. In cases like those mentioned, it is considered, for substantial reasons, that the title does not pass immediately upon the terms of the contract being agreed on; not that these cases create exceptions to the rule that the property will pass by the contract, if such be the intention of the parties, but the circumstances are such, and of such weight, that it is presumed that it was not the intention of the parties that the sale should be complete.

The case under review is distinguished, by marked peculiarities, from those embraced in the foregoing classification. The contract of sale was not obnoxious to the statute of frauds. The price was paid, and, consequently, no right of a vendor to have the unpaid purchase money existed. Nothing remained to be ascertained or adjust to determine what the rights of the parties were. The property had been inspected and approved; it was left with the vendor for the purchaser's convenience, and the mass from which the quantity alone was to be separated was identical in kind and uniform in value, so that the privilege of selection would not confer any advantage upon either party. Nothing was left undone by the parties, except measuring out the quantity purchased from any part of the whole bulk—a ministerial act which might be done by either party, or by any stranger, as well as by the parties themselves.

The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties, to a greater extent than is found in the older cases, and to engraft upon the rule that the property passes by the contract of sale, if such be the intention, few exceptions, and those only which are founded on substantial considerations affecting the interests of parties. At one time, it was held that, under an agreement to purchase an entire bulk at a specified price, the property did not pass if the whole amount of the purchase money depended upon an ascertainment by weight or measurement subsequently to be made. *Hansom v. Meyer*, 6 East, 614. This decision was made in favor of an

unpaid vendor, and was afterwards distinguished, on the ground that the weighing was to be done by the seller, and it was held that the property would pass if such was the intention of the parties, though something was to be done, such as weighing, measuring, or testing the goods, to ascertain the contract price, if what remained to be done was to be done by the buyer. *Turley v. Bates*, 2 H. & C. 200. This distinction was adopted in *Boswell v. Green*, 1 Dutcher, 390. Still later, the English courts entirely repudiated this distinction, and held in cases where the weighing was to be done by the seller, the property would pass, though the ultimate contract price was to be ascertained by a subsequent weighing, if the parties so intended; and Chief Justice Cockburn, in his opinion, said that "it is equally clear that, in point of principle and in point of common sense, there is nothing to prevent a man from passing the property to the thing he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards." *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Castle v. Playford*, L. R. 7. Ex 98. It may now be considered as the law of the English courts, that where the contract price has been paid or advances made on it, the property will pass to the buyer, according to the intention of the parties, although something remains to be done by the seller to complete the goods, in conformity with the contract, before they are ready to be delivered. *Young v. Matthews*, L. R. 2 C. P. 127; *Langton v. Waring*, 18 C. B. (n.s.) 315.

That the parties contemplated the corn should be measured before it left the vendor's possession, will not, of itself, prevent the property passing. Nor will the fact that the vendor was required to deliver it when the time for delivery arrived, accomplish that result. Where the goods sold have been selected and designated, and the price paid, the property will pass by the contract of sale, though it was one of the terms of the contract that the vendor should transport them to a place named for delivery. *Terry v. Wheeler*, 25 N. Y. 520. The case, therefore, must stand exclusively on the fact that no separation of the quantity sold had been made from the entire bulk before the execution was levied, and the question is, whether there is a rule of law requiring, under the circumstances of this case, a separation of the quantity sold from the larger bulk, before title will pass to the purchaser, so positive in its sanction as to overrule the intention of the parties.

It is undoubtedly the doctrine of the English courts that, "where there is a bargain for a certain quantity ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, there the right to them does not pass to the vendee until the vendor has made his selections." Per Bayley, B., *Gillett v. Hill*, 2 C. & M. 530. This

doctrine is founded on correct principles, where the gross bulk is variable in kind or quality, and the selection from it of that part which shall be delivered is of benefit to the vendor. It has been applied to a sale of a specified quantity, from a larger bulk and approved of it. *Aldridge v. Johnson*, 7 E. & B. 885.

In my judgment, this principle should not be applied where the bulk, from which the quantity purchased is to be separated, is uniform in kind and quality, and has been approved by the purchaser, and the full contract price has been paid. There is a clear and well settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects. It is recognized in cases of co-tenancy of personal property, readily divisible by weight or measurements into portions absolutely alike in quality and value. In such cases, either tenant may take his proper proportion, and it will be regarded as a proper severance, so long as he does not take more than his share; but the rule is otherwise in case of property not severable in this manner. In that event the partition must be by agreement, or proceedings in equity. *Tripp v. Riley*, 15 Barb. 333; *Channon v. Lusk*, 2 Lansing, 211; *Clark v. Griffith*, 24 N. Y. 595; *Freeman on Co-tenancy*, § 252; 6 Am. Law Rev. 458. It is also recognized in cases of the intermingling of the goods of several owners, where the whole is indistinguishable in quality and value. In *Jackson v. Anderson*, 4 Taunt, 24, one F., at Buenos Ayres, consigned to S. & Co. a barrel containing four thousand seven hundred and eighteen Spanish dollars, and advised the plaintiff that one thousand nine hundred and sixty-nine of them were designed for him as a remittance of the net proceeds of sale made by him on plaintiff's account. S. & Co. assigned the bill of lading to the defendants, who received the whole value of the four thousand seven hundred and eighteen dollars, and carried it to the credit of S. & Co. In an action of trover, the plaintiff was allowed to recover, and, consequently, there was no individualization of the specific dollars he was entitled to. It was contended by the defendants that, no separation having been made of the one thousand nine hundred and sixty-nine dollars to enable the plaintiff to designate them as his property, trover was not maintainable. The objection was overruled, and Chief Justice Mansfield said: "It appears that no separation was ever made from the whole quantity of one thousand nine hundred and sixty-nine dollars belonging to the plaintiff, and an objection has been taken on that ground against the form of action; but we think there is no difficulty in that point; the defendant has disposed of all the dollars, consequently he has disposed of those which belong to the plaintiff; and, as all are of the same value, it cannot be a question what particular

dollars were his One has a right to a certain number, and the other to the rest. If a man keeps all, and has no right to a part, the action lies for that part which he wrongfully detains."

* * * * *

There are authorities of great weight, that apply this doctrine to contracts of sale. (After citing and commenting on *Whitehouse v. Frost*, 12 East, 614; *Woodley v. Coventry*, 2 H. & C. 164; *Gillett v. Hill*, 2 C. & M. 530; *Knights v. Wiffen*, L. R. 5 Q. B. 660, and *Farmeloe v. Bain*, 1 C. P. D. 445, the judge continued.) These cases cited it is true, were against defendants who treated as mere custodians of the property, and the right to maintain the action was put on the ground of estoppel. The English courts make a distinction between this class of cases and actions directly between the vendor and purchaser. But, manifestly, this distinction is in semblance only, and not in substance. In each of the cases above cited, except *Gillett v. Hill*, the defendant was the original vendor, and no separation of the goods had been made as between him and his vendee, and the acceptance of a delivery order created no other contract than that in force between him and his vendee, to hold for the benefit of the sub-vendee a certain designated quantity of goods. Acceptance of the delivery order might estop a defendant from denying that he had that quantity of goods in his custody, subject to the order of the person signing the delivery order. But if there be a rule of law which overrules the intention of parties, and forbids property passing under a contract of sale, unless the quantity sold be separated from the larger mass, it is difficult to perceive why it should not produce the same result between the original vendor and the holder of a delivery order, who, in virtue thereof, succeeds only to the rights of the original contract of sale. Nor will the fact that a defendant stands in the position of being regarded as a mere custodian of the property materially alter the situation of the parties, for it is well settled that a vendor may become the bailee of his vendee, and the custodian for his benefit of the property sold, if the parties so intend. *Marvin v. Wallis*, 6 E. & B. 726; *Beaumont v. Brengeri*, 5 C. B. 301; *Castle v. Swarder*, 6 H. & N. 828.

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In the American courts the cases on this subject are quite conflicting. Many of them are cited and examined by Mr. Holmes in his notes to 2 Kent (12th ed.). 492, 590, and more particularly in his article in 6 Am. Law Review, 450.

In Virginia, New York, Connecticut, and Maine, the courts have held the broad doctrine, without qualification, that on a contract of sale of a certain quantity from a larger bulk, uniform in kind and quality, the property will pass, though there be no separation of the quantity

sold, if such be the intention of parties, and that no rule of law will overrule such intention if it be otherwise clearly expressed. *Pleasants v. Pendleton*, 6 Randolph, 473; *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118; *Chapman v. Shepard*, 39 Conn. 413; *Waldron v. Chase*, 37 Maine, 414

The doctrine held in these cases, it seems to me, is founded on good sense and correct legal principles. The rule that the property in goods will pass by the contract of sale, if such be the intention of the parties, is of the utmost importance in the transaction of the business of the country, and it ought not to be qualified by exceptions and restrictions which do not arise from the substantial interests of the parties.

In this case, the sale, in all material respects, was complete. The corn had been inspected and approved, and the price agreed on and paid. All these things had been done before the levy of execution. The property had been left with the vendor for the purchaser's convenience. Nothing was left undone but the measuring out the designated quantity from a bulk identical in kind and value, and a delivery to the vendee. That was done after the levy and before suit brought; and there is no pretence that it was unfairly done.

The defendant, by his purchase, and the payment of the price, acquired equitable right that ought, if possible, to be protected; and it is the policy of the law to protect interests acquired for a valuable consideration in good faith, against the claims of execution creditors. In trover property is involved only so far as determines the form of the action and the damages recoverable. The defence was a meritorious one, and no legal principle is in the way of permitting it to be made, if, in fact, the parties intended that the property should pass. That question should have been submitted to the jury, and, for that reason, the judgment should be reversed.

All concur for reversal.

PASSING OF THE TITLE IN THE CASE OF A SALE OF GROWING CROPS

ROCHESTER DISTILLING COMPANY V. RASEY

142 N. Y. 570 (1894)

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April, 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the repayment of money borrowed from him, executed and delivered to him a chattel mortgage which covered "the grass now growing upon the premises leased, etc.; also all the corn, potatoes, oats, and

beans which are now sown or planted, or which are hereafter sown or planted during the next year, etc." At the time but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes and all that of the beans was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops, and advertised their sale in August; at which sale plaintiff purchased them. After the levy by the sheriff, Page, the chattel mortgagee, gave notice, and sold the growing crops to the defendant. Defendant took possession of the property so purchased, and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans, and for the defendant as to the potatoes, and ordered the exception taken to that direction to be heard in the first instance at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge, and ordered a new trial, but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

GRAY, J. I think this case does not in principle, differ from any other case where a chattel mortgage has been given upon property in expectancy, and which has no potential existence at that time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion in several cases of a kindred nature in the reports of this court and of other courts in this State which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual or potential existence can operate to charge them with a lien when they come into existence, as against an attaching or an execution creditor, has frequently been discountenanced and repudiated. *Grantham v. Hawley*, Hob. 133, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential or possible existence, like the spontaneous product of the earth or the increase of that which is in existence, may properly be the subject of sale or of mortgage. The right to it when it comes into existence is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual or a potential existence before a planting. This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases which have arisen between the lessor of land

and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised to secure the payment of the rent would operate and be given legal effect as a reservation at the time of the title to the product of the land. That was the case of *Andrew v. Newcomb*, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent, the crop to remain the property of the landlord until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax, because the subject was not in existence. He held that the idea of a pledge or of a sale had no application, and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant, and not to the case of a mortgage or conditional sale to some third person of crops yet to be planted. . . .

McCaffrey v. Woodin, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien, as security for the payment of the rent," on all the personal property, etc, which should be put upon the premises, "and such lien to be enforced, on the nonpayment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the rights of the landlord to do so, holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen*, 19 N. Y. 123, it was remarked that that "is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights as a defence to the plaintiff's (the Lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually or potentially either possessed or owned by McCaffrey." In *Cressey v. Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Learned and Bockes, JJ., a chattel mortgage upon potatoes (among

other articles of property) which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey v. Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats v. Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not in esse may be effectual in equity to give a lien as between the parties, when the property comes into existence, and where there are no intervening rights of creditors or third persons." *Kribbs v. Alford*, 120, N. Y. 519, recognises the invalidity of a chattel mortgage of property thereafter to be acquired, but holds that, as between the parties, their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor, which, being conditional at the time, becomes absolute if at a fixed time the property is not redeemed; and the statute makes it valid as against creditors of the mortgagor only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things, or that such an instrument could operate to defeat the lien of an attaching or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien, and the levy of the execution upon the crops operated to transfer their possession, from the owner to that of the sheriff. As against his possession, the equities of the mortgages are unavailing for any purpose. Between the two creditors, it is a question of who had gained the legal right to have the crops in satisfaction of his claim, and the equitable right of the mortgagee to them as against his debtor was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below that there should have been a direction of a verdict for the plaintiff for the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage. The order appealed from should be affirmed, and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.

All concur, except Earl, J., not voting.

Ordered accordingly.

AN ORDER ON A WAREHOUSE IS NOT A DELIVERY

KEELER V. GOODWIN

111 Mass. 490 (1873)

Tort for conversion of 1,000 bushels of corn. At the trial in the Superior Court, before Lord, J., the following facts appeared:—

On September 29, 1870, Wesley P. Balch bought 1,000 bushels of corn from the defendants, to be paid for in cash in ten days, and the defendants gave him an order on the warehouse where the corn was stored, being then parcel of a larger quantity lying in bulk. On October 1, Balch indorsed and delivered the order to the plaintiff as security for a loan. The plaintiff did not then know that the corn had not been paid for; but Balch never paid for the corn, and, within ten days from September 29, became insolvent. About fifteen days after the receipt of the order, the plaintiff presented it to the warehouseman and demanded the corn. Delivery was refused for the reason that the order had been countermanded by the defendants; and before this suit was brought the defendants took the corn away. The order was never presented to the warehouseman except as stated above.

The plaintiff offered evidence tending to prove a usage in the grain trade to treat an order on a warehouse as a delivery.

The judge ruled that the action could not be supported, and directed a verdict for the defendants, which was returned. The judge reported the case for the determination of this court; if the ruling was correct, judgment to be entered for the defendants, unless the plaintiff could maintain his action by an amendment; if the ruling was erroneous, the verdict to be set aside and a new trial ordered.

WELLS, J. There are two fatal difficulties in the way of recovery by the plaintiff.

To maintain an action of trover, in favor of one who has never had possession, there must be proof both of title and right of present possession. *Fairbank v. Phelps*, 22 Pick. 535; *Winship v. Neale*, 10 Gray, 382; *Landon v. Emmons*, 97 Mass. 37.

Here was a contract of sale of 1,000 bushels of corn, "parcel of a larger quantity lying in bulk." Until separation in some form, no title could pass. *Young v. Austin*, 6 Pick. 280; *Merrill v. Hunnewell*, 13 Pick 213; *Scudder v. Worster*, 11 Cush. 573; *Weld v. Cutler*, 2 Gray, 195; *Ropes v. Lane*, 9 Allen, 502, 510; s. c. 11 Allen, 591. That it was on storage with a third party, as warehouseman, would make no difference in this respect.

Delivery of the order upon the warehouseman authorized him to

make the separation or appropriation necessary to complete the sale, by giving to the contract its intended effect upon the specific property covered by it. If that had been accomplished, either by actual separation, or by appropriation to the use or credit of the purchaser, in the usual mode of transacting the business of the warehouse, he would have acquired title, right of possession, and constructive possession of the grain so purchased. *Cushing v. Breed*, 14 Allen, 376.

But until some act takes place by which the relations of the warehouseman, in respect to the property in his custody, are modified in accordance with the contract of sale, so that he may be considered as bailee for the seller and purchaser respectively, according to their several interests, and thus released, *pro tanto*, from his original liability to the seller alone, there is no such appropriation of the grain sold as will ripen the interest of the purchaser into title and right to the possession of any specific portion of the bulk. Whether the assent of the warehouseman is necessary to the imposition of this twofold relation upon him, or whether presentation of the order alone, or notice of the sale would be sufficient, we need not now determine, because there was neither in this case, until after the authority of the warehouseman to make the appropriation had been revoked. The purchaser, therefore, never acquired any title or right of possession, and could transfer none, and consequently no right of action to the plaintiff. . . .

Judgment for defendants.

THE SALE OF A SPECIFIED CHATTEL PASSES THE PROPERTY TO THE VENDEE AND VESTS THE TITLE IN HIM WITHOUT DELIVERY

GROAT, ET AL. V. GILE

51 N. Y. 431 (1873)

Plaintiff's appeal from order of General Term, setting aside a verdict for plaintiffs and granting a new trial in an action to recover for wool which the defendant had shorn from sheep, to which the plaintiffs claimed title.

LORT, C. C. As the verdict of the circuit in favor of the plaintiffs was ordered by the judge who tried the action on the version given by the defendant of the contract or agreement between the parties, it becomes necessary to refer to it with particularity for the purpose of ascertaining whether his conclusion of law based thereon was correct.

The defendant, on his direct examination, after stating that the plaintiffs called on him about the 20th of May, 1864, and that he and the

plaintiff Groat had some conversation about the purchase of his sheep and lambs, in which he said that he wanted to sell the old sheep with the lambs, and that he would ask \$4 apiece for them, testified as follows: "They concluded to go and see the sheep; I told them where they were; one flock was near a mile from the house; they went off together; went to the further lot first; when they came back from this lot I told them where the others were; I told them I did not believe they would like that lot; they did not look as well as the others, as some of them had lost their wool; then they went off to see the other lot and came back; they asked me how many sheep and lambs there were; I told them I could not tell how many there were; I did not know myself; I think I said in the neighborhood of so many sheep and so many lambs; then they inquired about taking the sheep; it was agreed that they should take the lambs the middle of September and the old sheep the 1st of November, and pay me \$4 apiece for sheep and lambs; this was the contract; think I told them I would give them a good chance; something was said about cutting the lambs' tails off; I told them I thought it was not prudent; I tried to dissuade them from having it done; that they had got too large and might die; something was said in answer to it, but I don't know just what; they asked me if the sheep were sound after they had been to see them; I told them I did not consider them entirely sound; then they asked me that I should doctor the sheep if they needed it; I told them I would; after the talk they handed me over twenty-five dollars to bind the bargain, as they said; then they went away." On his cross-examination, he said: "When Groat and Jacobia were there in May, I had sheep in two lots; the sheep I sold them were in the lots mentioned; I sold them all that were in these lots; did not know how many sheep I had; had not counted them for some time; sometimes they die; told them I did not know how many I had that there would be in the neighborhood of ninety old sheep; they were to take all the sheep in the two lots except two bucks and a lame ewe; they got all the sheep in the two lots except two bucks and a lame ewe; they agreed to give \$4 per head; in the bargain they were to have all the sheep except two bucks and a lame sheep; I agreed to sell the sheep at that price; nothing was said about the wool; they got ninety-two old sheep and seventy-one lambs." And on further re-direct examination he said: "when they made the contract for these sheep, there was nothing said about the wool." And also; "Some of the lambs came in March, and so along, and some were only a few days old; some time in August is the usual and proper time for taking lambs from sheep; they had not been separated from the sheep on the 19th of May; the lambs were in no condition to be separated from the sheep at that time without ruining the lambs."

The preceding statement of the defendant's evidence contains all that relates to the negotiation and making of the agreement, and fully justifies the construction given to it by the learned judge at the circuit. It is clear that the plaintiffs intended to buy of the defendant, and that it was his intention to sell to them all of the sheep and lambs that were running in the two lots of land referred to by him (except two bucks and a lame ewe, as to the identity of which there was no question,) at \$4 per head, and that no further or other designation or selection was contemplated. All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that these were sufficiently identified. Indeed, that fact does not appear to have been disputed on the trial. Under such circumstances, when the terms of the sale were agreed on, and the payment of \$25 was made to the defendant on account of the purchase money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to take them without any agency in delivering them on the part of the defendant, and they, from the time the agreement was made, became the owners thereof. The defendant subsequently kept them at the risk of the plaintiffs. Chancellor Kent, in his *Commentaries*, vol. 2, p. 492, in stating the rule governing sales at common law, says: "When the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." This rule is modified by our statute of frauds so far as to require in certain cases that a note or memorandum of the contract shall be made in writing and subscribed by the parties to be charged, or that the buyer shall accept and receive a part of the property sold, or at the time pay some part of the purchase money; and in such cases he says, at p. 499: "When the bargain is made and is rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisition of the statute of frauds, the property, and with it the risk, attach to the purchaser, but though the seller has parted with the title, he may retain possession until payment. The fact that the number of sheep and lambs sold was not ascertained at the time the terms of sale were agreed on did not prevent the application of the rule referred to in this case. It is true that the same learned jurist, after stating that "it is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods of different values

be sold in bulk and not separately and for a single price, or per aversionem, in the language of the civilians, the sale is perfect and the risk with the buyer," adds, "but if they be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified." The present case is not one of the latter class. That rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of ascertaining the total value thereof at certain specified rates or a designated fixed price. This distinction is recognized in *Crofoot v. Bennett*, 2 N. Y. 258; *Kimberly v. Patchin*, 19 id. 330; *Bradley v. Wheeler*, 44 id. 495. The sale in question was in fact of a particular lot of sheep and lambs, and not of a certain undesignated number to be selected and delivered at a future time, and the postponement of the time for taking them away did not prevent the title passing to the plaintiffs.

A sale of a specified chattel may pass the property therein to the vendee and vest the title in him without delivery. See *Chitty on Contracts* (8th Am. ed.) 332, and *Terry v. Wheeler*, 25 N. Y. 520.

All the parties appear to have understood the transaction, at the time it took place, as a present absolute sale and change of title. What was said about cutting the lambs' tails off and doctoring the sheep, if they needed it, is evidence of such understanding and there is nothing in what is said to have been the agreement about taking them away inconsistent with it. That gave the plaintiffs the privilege of leaving them in the defendant's pasture till the time specified for taking them away, but did not deprive them of the right to take them before, if they chose so to do. . . .

It follows, from what has been said, that there was no error in the ruling of the judge that the title to the sheep passed to the plaintiffs immediately upon the completion of the contract and the payment of the \$25 by them. That necessarily carried with it the right to the wool on them it being shown that there was no reservation thereof, or anything said about it during the negotiation or at the time the contract was made. It is not a mere presumption, as stated in the prevailing opinion in the Supreme Court, that the parties "intended, in the absence of evidence to the contrary, that the title to the wool should follow the title to the sheep." As was well said by Justice Ingalls in his dissenting opinion, "When the sheep were sold the wool was grown and was a part of the sheep, adding to their value," and there is no reason or principle for saying that such particular part did not pass to the pur-

chaser with the rest of the animals. The sale was of the entire animal, and not of different parts or portions constituting it, or of what it was formed.

Assuming then that the legal effect of the agreement of the parties as testified to by the defendant himself, was to vest the title to the wool in the plaintiffs, it was clearly incompetent to show a custom in Columbia County, where the transaction took place, that the wool of sheep sold, under the circumstances disclosed, does not go to the purchaser. See *Wheeler v. Newbould*, 16 N. Y. 392, 401.

* * * * *

All concur.

Order reversed.

DELIVERY OF PROPERTY AND PASSING OF TITLE

GOSS PRINTING PRESS COMPANY V. JORDAN

171 Pa. St. 474 (1895)

Sheriff's interpleader to determine the ownership of a printing press.

At the trial it appeared that the plaintiff contracted to build a printing press for W. F. Jordan, the title to remain in plaintiff until the press was paid for on acceptance as satisfactory. The press was shipped from Chicago to Harrisburg, consigned to the Telegram Publishing Co. (which was W. F. Jordan), and received there by plaintiff's workmen and set up in Jordan's building. Before the expiration of the thirty days allowed for trial, and before the press had been accepted, or any payment made on account thereof, the parties entered into a second contract in form of a lease, with an alternative conversion into sale on compliance with certain conditions. After the second contract the sheriff levied upon the press as the property of W. F. Jordan, under an execution in favor of the present defendant. The trial court instructed the jury to find for the defendant, and plaintiff appealed.

MITCHELL, J. This case hinges on the question of delivery. The first contract was, beyond dispute, one of sale; and, although the title would not have passed between the parties until full performance of the conditions, yet after delivery, it would have been conclusively held to have passed, in favor of creditors of the vendee. Equally beyond dispute, the second contract was one of bailment, in which the title did not pass at all, as against the bailor, either in favor of the bailee or his creditors. The question, therefore, is whether the circumstances under which the second contract was made were such as to deprive it of the force and validity it would have had if it had been made in the first

instance. And of these circumstances the controlling one is whether or not there had been a delivery. If there had been, then all our cases agree that, without further change of possession, it was too late for any change of their contract by the parties to affect the rights of an execution creditor. If, on the other hand, there had been no delivery the contract was entirely executory, and could be changed at will by the parties. Delivery does not consist in the mere transfer of location or custody of property. There must be the minds of both parties concurring in the transfer in accordance with the contract,—the intent of one to deliver, and the other to receive. Thus, custody obtained surreptitiously or by trick or fraud, does not amount to delivery, not merely because fraud vitiates everything into which it enters, but because there is no meeting of the minds of the parties. If goods be bought in a store for cash, and wrapped up, and handed across the counter to the purchaser, there is no delivery, merely handing them to the purchaser to unwrap for examination will not be delivery. “In order to make a sale which is conditional as to the parties absolute as to creditors, there must be a delivery of the goods in pursuance of the contract, for without this there can be no present sale; and an agreement of sale, without an accompanying transfer, amounts to nothing more than a contract to sell at a future time, or upon the fulfillment of stipulated conditions. Furthermore, the delivery of possession alone, though a material indicium of ownership, does not of itself constitute a sale, for the goods may be delivered in bailment, as in loan or hiring. There must, in addition to the possession, be at least such a conditional or qualified title passed to the buyer as to give him a transferable interest in the chattels.” *Edwards’s Appeal*, 105 Pa. St. 103. The fact that the original intention of the parties was to make a sale, and that such was the legal effect of their first agreement, does not prevent a change, while it is still executory, into a bailment, with an alternative of future conversion into sale on compliance with stipulated conditions. That was decided in *Rowe v. Sharp*, 51 Pa. St. 26,—a leading case, and the first of importance in this court, requiring the construction of the so-called “leases” now in common use, which are intended as contracts of bailment, though looking to an ultimate sale. It is a case which, though sometimes thought to be on the border line, has never been qualified or pared down. The principal cases on this subject were very recently reviewed in *Brown v. Billington*, 163 Pa. St. 76, in which *Rowe v. Sharp* was reaffirmed and followed, both on principle and on its facts. “The purpose of the parties was to effectuate a sale in the future directly to the bailee, who was to have actual possession in the mean time under a different arrangement; and we gave it our sanction, as

against creditors of the bailee, because of the contract. In other words, although the intent of the parties, and the effect of their agreement was to vest the title at a future day in the purchaser, he having actual possession in the mean time, yet as the intervening arrangement was upon a valid contract of bailment, as between the parties, the title of the bailor was preserved until terminated by compliance with the provision for a sale, at which time that portion of the agreement became operative." 163 Pa. St. 80. The most important of the prior decisions were discussed by our Brother Green in that case, and it is not necessary to go over the ground so thoroughly covered by him. Two cases of later date have been cited, as to which a word may be said. In *Com. v. Harmel*, 166 Pa. St. 89, a contract in form of a lease was held to be a sale, upon the express finding of fact, on a summary conviction, that it was a sale, and that the form was a colorable attempt to evade the peddlers' act of 1830. And in *Ott. v. Sweatman*, 166 Pa. St. 217, the cases were very ably reviewed by Jenkins, J., in the court below, whose opinion was adopted by this court. But there the second contract, on which the bailment depended, was not made until after essential portions of the machinery had been delivered and paid for under the original contract of sale. If the same crucial fact of delivery exists in the present case then, as already said, the same result will follow.

In the light of these principles, was there a delivery under the first contract? That contract contemplated a formal acceptance, and a cash payment of \$6,500, after a thirty days' trial had proved the press to be in accordance with its requirements. These acts were to be concurrent. The vendor could not make delivery and demand acceptance till after trial, and the purchaser could not demand delivery without a tender of the money. Under such circumstances, the transfer of the press to Harrisburg, and setting it up in the purchaser's building, was certainly not a delivery, as matter of law, for neither party intended it as such. On the contrary, it was, *prima facie*, only a necessary step for the trial, which was to precede delivery and acceptance. That could only be had in Harrisburg, and therefore the press was brought there, under the explicit terms of the contract, for that purpose, in the first instance. All the other facts, such as the shipping of the press with bill of lading naming the Harrisburg Telegram as consignee, the acts or sayings of the Goss Company's men during the trial, &c., are comparatively unimportant, for they must be considered in connection with the intention of the parties, and in subordination of the requirements of their contract. If what was done with the press, up to the time of the second contract, was merely carrying out the preliminary trial which was required by the first contract, and there was no delivery or accept-

ance until after the making of the second contract, as the testimony of W. F. Jordan himself seems to indicate, and the second agreement was made because of Jordan's inability to comply with the terms of the first, then, as the second was an unquestionably good contract of bailment, the delivery under it passed neither title nor possession to the bailee which was subject to levy by his creditors. But if, on the contrary, after the trial was completed, both parties agreed to a delivery, and it was actually made under the first contract, and the second was an afterthought merely to secure the payment of the price to the Goss Company, then, as against the execution creditor, such agreement was ineffectual. These are questions of fact, which should be submitted to the jury, under instructions in accordance with the foregoing views.

Judgment reversed, and venire de novo awarded.

PASSING OF TITLE IN EXECUTORY CONTRACT OF SALE

DEXTER V. NORTON, ET AL.

47 N. Y. 62 (1871)

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the one hundred and sixty-one bales in question by the sellers before delivery. The title therefore did not pass to the vendee, but remained in the vendor. *Joyce v. Adams*, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable

accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is, that he might have provided against them by his contract. *Paradine v. Jane*, Aleyn, 27; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272.

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had without his fault become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decisions upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract. . . .

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end." *Benj. Sales*, 424. In replevin for a horse and judgment of retorno habendo, the death of the horse was held a good plea in an action upon the bond. *Carpenter v. Stevens*, 12 Wend. 589. In *Taylor v. Caldwell*, 3 Best & Smith, 836, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned. Held, that both parties were discharged from the contract. *Blackburn, J.*, at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." . . .

We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, is to recognize such a distinction, and it is based upon the

presumption that the parties contemplated the continued existence of the subject matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated, of an implied condition in case of the destruction of the property bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can, of course, always protect himself against the effect of implied condition by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the consideration urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy; but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

Allen, Grover, and Rapallo, JJ., concur; Peckham and Folger, JJ., dissent.

Judgment affirmed.

EXPRESS WARRANTY

CHAPMAN V. MURCH

19 Johns. 290 (1822)

Assumpsit for breach of an express warranty of the soundness of a horse traded by defendant to plaintiff. On the trial, plaintiff offered to show that defendant at the time of the trade represented his horse to be sound, but that he was unsound, having the disease called the yellow water, of which he died the following day. The evidence was excluded as not tending to prove an express warranty.

SPENCER, C. S., delivered the opinion of the court. In the various cases which have been cited, it appears, abundantly, that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears, that it is necessary that the vendor should use the express words, that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive, that this is not a warranty, and express one too. Peake (on Evid. 228) says: "In an action on a warranty, the plaintiff must prove the sale and warranty." "In general, he says, "any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." He adds, "But where the defendant refers to any document, or to his belief only in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty, it must be shown that there was an express and direct affirmation of the quality and condition of the things sold, as contradistinguished from opinion, etc., and when that is made out, it would be an anomaly to require that the word warrant should be used. Any words of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court. *Seixas v. Woods*, 2 Caines, 56; *Pasley v. Freeman*, 3 Term Rep. 57; *Cramer v. Bradshaw*, 10 Johns. Rep. 484.

The judgment must be reversed, and a venire de novo awarded to the court below.

Judgment reversed.

INSPECTION OF THE ARTICLE AND IMPLIED WARRANTY

SALISBURY, ET AL. V. STAINER, ET AL.

19 Wendell (N. Y.) 159 (1838)

The plaintiffs declared for deceit in the sale of 184 bales of Italian hemp, amounting to 64,850 lbs., for which the plaintiffs paid the defendants at the rate of \$210 per ton, the sum of \$5,775.71, besides charges for cartage. The declaration also contained counts on a warranty. The defendants pleaded the general issue. When the hemp came to be worked, it was discovered that the interior of the bales was very different from the exterior, not only being of an inferior quality but containing large quantities of tow. The plaintiffs opened and worked 12 bales, and reshipped the remainder to the city of New York, where the defendants resided, and tendered the hemp to the defendants, demanding a return of the money paid for it. The hemp was examined in New York by two men experienced in the article, who concurred in stating that it was not worth more than \$150 per ton. The plaintiffs produced a letter accompanying the invoice received by them from the defendants, containing the following clauses: "There is no more first quality hemp now remaining, but we should be glad to sell our third quality at about \$175, if you have any use for it. We have only 8 tons of it on hand. Our second quality we hold at \$205 for retail," and "Advices received from Trieste this morning by the English packet, quote first quality Ferrara hemp, same as sold to you," etc. The plaintiffs also proved that the defendants, in speaking of the hemp in question to other persons to whom they offered to sell the same previous to the sale to plaintiffs, represented it as hemp of the first quality. On the part of the defendants, it was proved that the purchase was made by the plaintiff S. E. Salisbury; that the hemp at the time of the purchase was not in the defendant's store-house, but in the store-house of Messrs. De Rham & Moore; that the defendants sent a person in their employment to the store of De Rham & Moore to show the hemp to the plaintiff, telling him at the same time, Examine well for yourself; the plaintiff proceeded to where the hemp was, cut open a bale, and, though he said nothing, appeared satisfied with the quality. The witness testified that the plaintiff might, if he had so chosen have cut open every bale; he had the opportunity. It was further proved that the plaintiffs disavowed charging the defendants with fraud in the sale of the hemp.

The counsel for the plaintiffs conceded that there could be no recovery on the ground of fraud, but insisted that the plaintiffs were entitled to a verdict on the grounds: either that an express warranty

had been proved, or that the sale was by sample, from which a warranty might be implied that the bulk of the article should correspond with the exterior of the bales. The judge charged the jury that if the plaintiffs were entitled to recover, it must be on the ground of an express warranty or sale by sample, that whether the representations of the plaintiffs amounted to an express warranty, or were mere matter of opinion or description, was a question for the jury; that the sale being by inspection of an article that could not be examined, there was an implied warranty that the inside of the bales corresponded with the outside; and if they believed that the inside did not correspond, but was defective, the plaintiffs would be entitled to their verdict. He also instructed them to find specially whether the sale was on an express warranty or by sample. The jury found that the sale was by sample, and gave the plaintiffs a verdict for \$6,110.45. The defendants' counsel having excepted to the charge, and obtained a bill of exceptions, to be sealed, now moved for a new trial.

BY THE COURT, BRONSON, J. This was not a sale by sample. Salisbury was told to examine, and did examine the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied of the quality and condition of the goods, he should either have proceeded to a further examination, or provided against a possible loss by requiring a warranty. Where the purchaser has an opportunity to inspect the goods, no principle is better settled than that the seller, in the absence of fraud, is not answerable for latent defects. The rule in such cases is caveat emptor. The judge erred in charging the jury that there was an implied warranty that the inside should correspond with the outside of the bales. It is unnecessary to examine the other exceptions taken on the trial.

New trial granted.

WHERE ANYTHING REMAINS TO BE DONE BY THE SELLER,
SUCH AS WEIGHING OR MEASURING THE GOODS, AS
BETWEEN HIM AND THE BUYER, THE TITLE WILL NOT
PASS UNTIL SUCH WORK IS DONE

RESTAL V. ENGEMOEN

67 N. W. (Minn.) 1146 (1896)

CANTY, J. This action was brought to recover \$38.41, the price of a cow and steer which plaintiff alleges he sold to defendant. Plaintiff had a verdict, and from the judgment entered thereon defendant appeals. Plaintiff testified that about March 1, 1892, defendant came

to his farm, looked at the cow and the steer, and agreed to give him 2 cents per pound for the cow and 2.35 cents per pound for the steer, paid him \$1 on the cow and \$1 on the steer, and asked him to keep them, and feed them corn and potatoes, until April 26th following, and then to deliver them to defendant at Pelican Rapids, a town some distance from the farm; that plaintiff did so keep, feed, and deliver them, but that defendant refused to receive them. Thereupon plaintiff weighed them, and thereby ascertained the amount of the purchase price. Defendant testified that he told plaintiff that he would take the cattle at the price specified, if plaintiff would "feed them up to beef." Said the witness: "I told him I could not handle cows at all unless they were fed up to beef They were very poor. I could not take them because they were not fed up to beef." Plaintiff testified that defendant merely told him to feed "them a little potatoes and corn, but don't give them too much any of the time," and denies that he agreed to fatten them. We are of the opinion that the evidence does not sustain the verdict and judgment. In *Martin v. Hurlbut*, 9 Minn. 142 (Gil. 132) the following extract is quoted with approval from *Joyce v. Adams*, 8 N. Y. 291; "It is a general rule of law that, where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. But if anything remains to be done on the part of the seller, as between him and the buyer, such as weighing, measuring, or counting out a common parcel, before the goods purchased are to be delivered, until that is done the right of property has not attached in the buyer." See also *Rail v. Lumber Co.*, 47 Minn. 422 In the present case there were altogether too many things to be done by the vendor to the chattels before delivery, and too few circumstances indicating an intention to vest title immediately, so that a finding that such intention existed can not be sustained. Plaintiff's remedy was an action for damages for a breach of the executory contract.

Judgment reversed and a new trial granted.

CHANGE OF LOCATION WITHOUT DELIVERY

MCNEAL v. BRAUN

53 N. J. L. 617 (1891)

DEPUE, J. Braun, the plaintiff below, in 1883 was a wholesale dealer in coal in Philadelphia. McNeal, who is now plaintiff in error, was engaged in the foundry business at Burlington, in this State.

On the 14th of June, 1883, McNeal ordered from the plaintiff ninety-eight tons of lump and steamboat coal, to be delivered at Burlington, at \$4.10 a ton delivered. The coal was shipped in a barge called "The Wayward," on the 21st of June. The barge arrived at Burlington on the 23rd, but it was not until the 26th that she was laid alongside of the wharf. On the afternoon of that day the defendant's foreman notified the captain of the barge to place it alongside of the defendant's wharf. In order that the boat might be so placed that the steam-hoist could be used for unloading, the boat was separated into its two parts. The forward part was made fast to the wharf, being separated from the wharf by a float about three feet wide, furnished by the defendant, for the purpose of steadying the boat in a position that was necessary for the working of the iron buckets on the steam elevator. The after part of the boat was moored on the river side of the other part.

When the forward compartment of the boat was placed in position, the buckets of the hoisting works were lowered upon the boat, and preparations were made by the defendant's servants for unloading the coal. They completed their preparations about ten minutes before six o'clock, and stopped work at six, the usual time for quitting work. During the night this compartment of the boat sank with the coal that was in it.

The compartment that was moored in the river remained in safety. After the sinking of the forward compartment, the coal that was in the other compartment, was unloaded and taken by the defendant. The suit was for the whole quantity of coal sold, but the controversy at the trial was with respect to the coal that was sunk and entirely lost. Under the charge of the court, the jury found for the plaintiff the full contract price for the entire shipment.

The order for the coal was given by the defendant to Arkless, the agent of the plaintiff, at the plaintiff's place of business in Philadelphia. The order was for a cargo of coal of an approved size and quality. The coal was not, at that time, separated from the plaintiff's stock on hand. The price to be paid was \$4.10 per ton delivered at Burlington. The carrier was selected by the plaintiff, and he took from him a bill of lading, signed by the master, in these words: "Shipped by Charles Braun, in good order, on board the boat called 'Wayward,' now lying at Philadelphia, and bound for Burlington, N. J., ninety-eight tons of Thomas Lehigh coal, which I promise to deliver at the aforesaid port of Burlington, in like good order, the dangers of the seas only excepted, unto A. H. McNeal or ——— assigns, he or they paying freight for the same at the rate of twenty-one-hundredths dollars per ton.

25 tons lump.
73 tons steamboat.

98

Captain to tend guy."

The contract price of \$4.10 a ton was the price of the coal delivered at Burlington. If the defendant paid freight pursuant to the direction in the bill of lading, the freight paid was to be deducted from the contract price.

Responsibility for loss in transportation, in carriage by sea, has occasioned considerable discussion in the English courts. The rules on this subject are stated by Lord Cottenham in *Dunlop v. Lambert*, 6 Cl. & F. 600, 619, 620, 621, and by the Court of Queens' Bench and the Exchequer Chamber in the *Calcutta Company v. De Mattos*, 32 Law Jour. Q. B. 332; 33 Id. 214; and particularly by Mr. Justice Blackburn, whose opinion in that case is quoted at considerable length in 1 Benj. Sales (Corbin's ed.), § 503, and more fully in Blackb. Sales (Blackstone ed.), *234.

It is sometimes stated, as a general rule, that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale, as in *Tregelles v. Sewell*, 7 Hurlst. & N. 573. It will also be found that the rule, uniformly adopted in the line of decisions, is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract and the intention of the parties. In *Dunlop v. Lambert*, Lord Cottenham said: "When the party undertaking to consign undertakes to deliver at a particular place, the property till it reaches that place, and is delivered according to the terms of contract, is at the risk of the consignor." In *Calcutta Company v. De Mattos*, Mr. Justice Blackburn said: "There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. . . . If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this is also effectual. In such

a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination."

The De Mattos Case, above cited, was decided in the Queen's Bench by an equally divided court, and in the Exchequer Chamber there was a diversity of opinion among the judges. But on the question of law pertinent to this case there was entire unanimity of opinion among the judges in both courts. The contract of sale had been negotiated by correspondence, and the material facts were briefly these: De Mattos contracted to deliver the company one thousand tons of coals, delivered at Rangoon, alongside, etc., at forty-five shillings a ton—payment, one-half by bill at three months on handing over bill of lading and policy of insurance on the cargo to cover payment, and the balance in cash on delivery at Rangoon. De Mattos chartered a ship, and shipped on board eleven hundred and sixty-six tons of coal and delivered to the company the bill of lading and the policy of insurance, and the company paid the half of the invoice price. On the voyage the ship became disabled, and, in fact, the coals were not delivered under the contract. Cross suits were brought,—the one by De Mattos to recover the unpaid contract price, the other by the company to recover back the money paid on the contract. The Queen's Bench (Cockburn, C. J.; and Wightman, J.) decided that De Mattos could not recover the residue of the contract price, and that the company was entitled to recover back the money paid as damages arising from the breach of contract. Blackburn and Mellor, JJ., concurred in the view that De Mattos could not recover, but held that the company was not entitled to recover back the half contract price it paid, for the reason that, by their construction of the contract, the portion of money paid to De Mattos was to be absolutely his on handing over the policy and the bill of lading. In delivering his opinion, Cockburn, C. J., said: "In every contract of sale, there is, on the part of the vendor, an obligation not only to transfer the property in the thing sold, but also to deliver possession to the buyer. When and how that delivery of possession shall take place, whether in the interval the thing sold shall be at the risk of the buyer or seller, so that if it be lost without default on the part of the latter, he shall nevertheless be entitled to demand the price or to retain it if already paid, must depend on the agreement of the parties as expressed or to be gathered from the contract. If, by the terms of the contract, the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was in the meantime to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly."

In the Exchequer Chamber the majority of the court concurred in the views of Blackburn and Mellor, JJ., in the company's case, by a divided court, but all the judges concurred in the judgment of the Queen's Bench, that De Mattos' action could not be maintained. It will be observed, that of the ten judges who sat in both courts, Cockburn, C. J., and Wightman, Blackburn, and Mellor, JJ., in the Queen's Bench, and Erle, C. J., Willes, J., Channell, B., and Williams, J., held that the property in the coals passed to the company by force of those terms of the contract in relation to insurance of the cargo and the transfer of the policy and the delivery of the bill of lading, but that the vendor was nevertheless debarred from recovering the unpaid contract price as a consequence of his failure to deliver the coals according to contract.

It was undisputed in the case now before the court, and, in fact, was conceded by the plaintiff's counsel, that delivery of the coal by the plaintiff, at Burlington, at his own expense, was a material term in the contract of sale. Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent, to perform for him the act of delivery in execution of his contract. 1 Benj. Sales (Corbin's ed.), § 566. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk.

On the main issue, which the learned judge declared to be the question whose loss was the coal which sank, his instruction was that this issue would depend upon whether the sale had been completed before the loss occurred; that where parties have bargained, the one that he will sell and the other that he will buy, the duty rests upon the seller to deliver the article in pursuance of the agreement he has made, and that to complete the sale there must be an acceptance by the purchaser of the article which he purchased, in accordance with that agreement; that when that has been done "the sale is completed, and any loss after that time falls upon the man who bought. I mean any loss which is the result of no wrongful or intentional negligence of the parties."

The court also instructed the jury that, if there was an acceptance by the defendant, then the position of the captain became changed, and his duty as the agent of the plaintiff was at an end. And this question was left to the jury upon the acts and conduct of the defendant's servants before they stopped work that night, with the instruction that if the jury should determine from the testimony "that the defendant or his employers so acted that they recognized that that coal was there at their disposal, under their dominion, within their power, and that they so acted as to show that they were dealing with it as if it were McNeal's from those acts you may determine that there was an acceptance of the coal as being the coal which had been bought under that bargain."

The transaction between the parties was an order for a certain quantity of coal, part lump coal and part steamboat coal, of an approved quality. It was in effect a contract of sale by sample. On such a sale of goods it is a condition implied by law that the buyer shall have a fair opportunity, by examining the goods, to satisfy himself that they are in accordance with the contract. 2 Benj. Sales (Corbin's ed.) § 910, 1025, 1042; *Isherwood v. Whitmore*, 11 Mees. & W. 347; *Startup v. McDonald*, 6 Man. & G. 593; *Croninger v. Crocker*, 62 N. Y. 152. And under a shipment of goods by a carrier the consignee is entitled to inspect and examine the goods to ascertain whether they correspond with the invoice, and to a reasonable time within which to receive and remove the goods. For that purpose a reasonable time within usual business hours must be allowed, and during that period the liability of the carrier as carrier remains undischarged. *Bradstreet v. Heron*, Abb. Adm. 209, 214; *Salmon Falls Manufacturing Co. v. The Bark Tangier*, 1 Cliff, 396; *Dibble v. Morgan*, 1 Wood, 406; *The Tybee*, Id. 358, 363; *The Braque Idd. v. Kemball*, 8 Ben. Adm. Pr. 297; 5 Myer Fed. Dec., "Carriers," §§ 802, 803, 846, 852, 1009; *The Eddy*, 5 Wall. 481, 493; *Price v. Powell*, 3 Comst. 322; *Dunham v. B. & A. R. R. Co.*, 46 Hun, 245; *Miller v. Steam Navigation Co.*, 6 Seld. 431; *Hedges v. H. R. R. Co.*, 6 Robt. 119; reversed in Court of Appeals, but not on this point, 49 N. Y. 223; *Moses v. B. & M. R. Co.*, 32 N. H. 523; *Graves v. The H. & N. Y. Steamboat Co.*, 38 Conn. 143, 152; *Richardson v. Goddard*, 23 How. 28, 39; *Bourne v. Gatcliffe*, 3 Man. & G. 643, 687; s. c. 11 Cl. & F. 45, 70; 3 Lew. Annot, R. R. & Corp. Rep. 54; note to *Columbus & Western R. R. Co. v. Luddem*.

The acts done by the defendant's servants before they quit work were of a twofold character. First. In directing the barge to be laid alongside of the wharf for unloading. The captain made the boat fast to the wharf and remained in charge during the night. The designation by the defendant of his wharf as the place for unloading, was an act in performance of the defendant's duty as consignee to provide a place for the discharge of the cargo. Second. In the preparation for unloading. The barge was laid alongside the float about ten minutes before six. The buckets were lowered down upon the barge, and possibly a small quantity of coal was unloaded. The hands quit work at six, and replaced the buckets on the wharf. In these acts there was no evidence of an acceptance of the entire cargo, nor of a discharge of the carrier from his responsibility. Under the rules of law I have stated, the defendant was entitled to a reasonable opportunity to unload the entire cargo for examination, to ascertain whether the coal corresponded with his order and had arrived in good condition. By law he was secured these rights

without discharging the liability of the carrier. Even if the goods had been accepted so as to pass title as between vendor and purchaser, the defendant, under the plaintiff's undertaking to deliver them at Burlington, still had a right to a reasonable time to unload them under the plaintiff's contract to transport and deliver the goods.

For affirmance—None.

For reversal—The Chancellor, Chief Justice, Depur, Dixon, Knapp, Magie, Reed, Van Syckel, Brown, Clement, Smith. 11.

A CONTRACT FOR MAKING A SET OF FALSE TEETH IS FOR
GOODS SOLD AND DELIVERED, AND NOT FOR
LABOR PERFORMED

LEE V. GRIFFIN

1 *Best & Smith*, 272 (1861)

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon dentist for the said Frances P.

Plea, that the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the sittings for Middlesex after Michaelmas term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth, and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:—

My dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, etc.,

FRANCES P.

Shortly after writing the above letter Frances P. died.

* * * * *

In Hilary term following, a rule nisi having been obtained accordingly, Crompton, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the statute of frauds. . . .

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two courses of action is sometimes very fine; but where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done and materials provided, as it could hardly be said that the subject matter of the contract was the sale of a chattel; perhaps it is more in the nature of a contract merely to exercise skill and labor. *Clay v. Yates*, 1 H & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor as compared to that of the material supplied is a criterion by which to decide whether the contract be for work and labor, or for the sale of the chattel. Here however, the subject matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement and fitting of the garment.

BLACKBURN, J. On the second point, I am of the opinion that the letter is not a sufficient memorandum in writing to take the case out of the statute of frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category.

* * * * *

In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words the substance of the contract was for goods sold and delivered. I do

not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless, be a contract for the sale of a chattel.

Rule absolute.

CONTRACT TO MAKE A WAGON IS FOR WORK AND LABOR
AND IS NOT WITHIN THE STATUTE

CROOKSHANK V. BURRELL

18 Johnson (N. Y.) 58 (1820)

In error, on certiorari to a justice's court. B. declared against C. before the justice on a contract between him and the defendant, whereby it was agreed that B. should make the wood-work of a wagon, which the defendant was to pay for in lambs at one dollar a head. The plaintiff claimed twenty-five dollars. The agreement was proved, and that the plaintiff had made the wagon within the period limited. It was also proved that the defendant was to come for the wagon, and pay for it in lambs at one dollar apiece. The judgment was for twenty-four dollars and ninety-four cents, the plaintiff having remitted six cents; and the objections were; first, that the contract was within the statute of frauds, second, that the plaintiff ought to have tendered the wagon.

SPENCER, C. J., delivered the opinion of the court. It nowhere appears that the value of the wagon or the price of it was ten pounds or upwards. The plaintiff claimed to recover twenty-five dollars; but this does not denote the price of the wagon, and it is mere matter of form. But, admitting that the price agreed on was twenty-five dollars, still it would not be a case within the statute. In *Bennett v. Hull*, 10 Johns. Rep. 364, we decided that the statute applied to executory as well as other contracts; and we recognized the cases of *Rondeau v. Wyatt*, 2 H. Bl. 63, and *Cooper v. Elston*, 7 Term Rep. 14, as containing a just and sound construction of the statute. In giving the opinions in those cases, the judges referred to the case of *Towers v. Osborne*, Str. 506, with approbation. In that case, the dependant bespoke a chariot, and after it was made for him refused to take it; and Pratt, C. J., ruled that it was not a case within the statute. In *Clayton v. Andrews*, 4 Burr. 2101, it was decided that an agreement to deliver wheat, understood to be unthrashed, was not within the statute. The distinction taken by Lord Loughborough in *Rondeau v. Wyatt*, and by the

judges who gave opinions *seriatim* in *Cooper v. Elston*, was between a contract for a thing existing in *solido*, and an agreement for a thing not yet made, to be delivered at a future day. The contract in the latter case they considered not to be a contract for the sale and purchase of goods, but a contract for a thing existing in *solido*, and an agreement for a thing not yet made, to be delivered at a future day.

The contract in the latter case they considered not to be a contract for the sale and purchase of goods, but a contract for work and labor merely. However refined this distinction may be, it is well settled, and it is now too late to question it.

It appears that the defendant was to come after the wagon, and that it was completed at the time agreed upon. It is necessarily to be inferred that, when he came for the wagon, he was to pay for it in the mode agreed upon; and of course he was to drive his lambs to the plaintiff. We are of the opinion that the judgment must be affirmed.

Judgment affirmed.

SPECIAL CONTRACT—SALE OF GOODS OR CONTRACT FOR LABOR

GODDARD V. BINNEY

115 Mass. 450 (1874)

Action for the price of a buggy. Defendant gave an order to plaintiff, a carriage manufacturer, for a buggy, with special directions as to materials and style of finish, to be done in about four months. Before defendant took it from the plaintiff's premises it was destroyed by fire without plaintiff's fault. The other important facts appear in the opinion.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. (After stating the New York rule and the modern English rule, the Judge proceeded.)

In this Commonwealth a rule avoiding both these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufacturer or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to

which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner v. Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale, and within the statute. To the same general effect are *Waterman v. Meigs*, 4 Cush. 497, and *Clark v. Nichols*, 107 Mass. 547. It is true that, "in the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties property in personal chattels may pass by bargain and sale, without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent for that purpose to his acceptance of possession. *Dixon v. Yates*, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price is in the seller. There could in fact be no such lien, without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained

and sold can be maintained where the goods have been selected by the buyer and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the mean time. *Noy's Maxims*, 89; 2 *Kent, Com.* (12th ed.) 492; *Bloxam v. Sanders*, 4 B. & C. 941; *Tarling v. Baxter*, 6 B. & C. 360; *Hinde v. Whitehouse*, 7 East, 571; *Macomber v. Parker*, 13 Pick. 175, 183; *Morse v. Sherman*, 106 Mass. 430.

In the present case nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and

Judgment entered for the plaintiff.

**THE EXPRESSION "GOODS, WARES, AND MERCHANDISE"
IS EQUIVALENT TO "PERSONAL PROPERTY" AND
INCLUDES A MORTGAGE ON REAL ESTATE**

GREENWOOD v. LAW
55 N. J. L. 168 (1892)

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this state for the sum of \$3,700. Law alleged that Greenwood entered into a parol agreement with him, to assign him this mortgage for the sum of \$3,000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement.

On the trial below, a motion was made to nonsuit the plaintiff, on the ground that the alleged agreement was within the statute of frauds.

The refusal of the trial court to grant this motion is assigned for error. . . .

In *Baldwin v. Williams*, 3 Met, 365, a parol contract for the sale of a promissory note was held to be within the statute.

In Connecticut and Maine a contract for the sale of shares in a joint stock company is required to be in writing. *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430.

Bonds and mortgages were expressly held to be goods and chattels in *Terhune v. Executors of Bray*, 1 Harr. 53. That was an action of trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which upon sound legal principles such securities are goods and chattels.

This sense ought to be applied to these words in this case.

Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property.

The words "goods, wares and merchandise" in the sixth section of the statute are equivalent to the term "personal property" and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section. In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit. All concur.

Judgment reversed.

A MEMORANDUM MUST BE SIGNED BY THE PARTY TO BE CHARGED

BROWN V. WHIPPLE

See under Contracts, page 96

WHAT CONSTITUTES A PART PAYMENT?

EDGERTON V. HODGE

41 Vt. 676 (1869).

Assumpsit for breach of contract by defendant to sell and deliver all the new milk cheese he then had on hand, about 975 pounds, and what he should make during the season of 1864, at 15½ cents a pound. To

a judgment for \$306.62, and costs in favor of the plaintiff, the defendant excepted.

WILSON, J. The parol agreement entered into by the parties, June 30th, being for the sale of goods, wares, and merchandise for the price of forty dollars and more, is within the statute of frauds, and inoperative, unless taken out of the statute by the subsequent acts of the parties. It is claimed by the plaintiff that the defendant's letter under date of July 1st, and the depositing of the plaintiff's letter with the fifty dollars in the post office on the 2d of that month, constitute a payment of part of the purchase money within the meaning of the statute. It will be observed that, when those letters were written, no binding agreement had been concluded. The defendant, in his letter of July 1st, says: "According to our talk yesterday, you bought my cheese for the season. I shall stand to it, but shall want fifty dollars to bind it." By that letter the plaintiff was notified that he could make the bargain binding upon himself as well as the defendant, by paying to the defendant the sum demanded for that purpose. The plaintiff on the 2d day of July enclosed fifty dollars in a letter, directed to the defendant and deposited it in the post office, which letter was delivered to the defendant on the 8th of that month. He did not accept the money, but returned it to the plaintiff. It is clear that the act of depositing the letter and the money in the post office was not a payment to the defendant. His letter did not direct the money to be sent by mail; it contains nothing that would indicate that the defendant expected the plaintiff would reply by letter, or accept the proposition by depositing the money in the post office; and the fact that the defendant by letter offered to allow the plaintiff to perfect the agreement by paying part of the purchase money did not authorize or invite the plaintiff to send the money by mail, or make the mail the defendant's carrier of the money. The language of the defendant's letter is: "I shall want you to pay me fifty dollars to bind it," that is, to make it a valid contract.

The money, when deposited in the post office, belonged to the plaintiff; it belonged to the plaintiff while being carried by mail to the defendant, and it would continue the property of the plaintiff unless accepted by the defendant. The plaintiff took the risk, not only of the safe conveyance of the money to the defendant, but also as to the willingness of the defendant to accept it. The defendant's letter, not constituting such a note or memorandum of the agreement as the statute required, left it optional with the defendant to accept or refuse part payment when offered to him, the same as if the defendant had sent to the plaintiff a verbal communication of the same import as the defendant's letter. A point is made by counsel as to whether the money was

conveyed and delivered or offered to the defendant, within a reasonable time after his letter was received by the plaintiff, but it seems to us that the time the money was offered is not material. We think, even if the plaintiff had gone immediately after receiving the defendant's letter, and offered and tendered to him the fifty dollars, the defendant would have been under no legal obligation to accept it. The mere offer of the defendant to receive the money would not estop him from refusing to accept it; but in order to take the case out of the operation of the statute, it required the agreement or consent of both parties, as to payment by the plaintiff and acceptance of it by the defendant. Upon the facts of this case, we think the rights of the parties rest upon and are to be determined by the verbal agreement entered into by them on the 30th of June, and that their subsequent attempts to make that agreement a valid contract cannot aid the plaintiff. The statute provides that "no contract for the sale of any goods, wares, or merchandise for the price of forty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

The very language of the statute above quoted implies that, in whichever way the parties verbally agree or propose that contract for the sale of goods, wares, or merchandise for the price of forty dollars or more, shall be made exempt from the statute of frauds, whether it be by the purchaser accepting and receiving part of the goods so sold by giving something in earnest to bind the bargain, or in part payment, or by making a note or memorandum of the bargain, it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by consent of the seller; the purchaser could not give something in earnest to bind the bargain, or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed unless by the consent of the party to be charged thereby. A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act; and each acquires a right to what the other promises; but if the parties, in making a contract like the present one, omit to do what the statute requires to be done to make a valid contract, it would require the consent of both parties to supply the thing omitted. Suppose it had been one stipulation of the verbal agreement on the 30th of June that the plaintiff should give and the defendant

receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated, and the defendant had refused to receive it, saying that he preferred not to receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract. But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute of frauds as is the agreement or contract taken as a whole; and a note or memorandum in relation to giving something in earnest to bind a bargain, or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party.

The judgment of the county court is reversed, and judgment for the defendant for his costs.

**A MEMORANDUM MAY CONSIST OF TWO OR MORE PIECES
OF PAPER BUT THEY MUST BE SO CONNECTED AS TO
FORM ONE MEMORANDUM OF THE CONTRACT**

OLIVER v. HUNTING

44 Ch. Div. 205 (1890)

In August, 1888, Emma Oliver, a married woman, possessed of considerable separate estate, negotiated with a Mr. Hunting for the purchase of a freehold property known as the Fletton Manor House estate. Eventually she agreed to purchase it for £2,375, and on the 7th of September, 1888, he signed the following document:

"Memorandum of terms of agreement between Mr. Hunting and Mrs. Oliver: Price £2,375. Vendor to make good title. Purchaser to pay for her own conveyance. Fixtures included in purchase. Purchase to be settled as soon as possible. Possession on 25th September. Deposit to be paid on the 10th."

On the 12th of September, 1888, Mr. Hunting wrote and sent a letter to Mrs. Oliver in the following words:—

"I beg to acknowledge receipt of check, value £375, on account of the purchase money for the Fletton Manor House estate."

Mr. Hunting having refused to complete, Mrs. Oliver commenced this action against him, claiming specific performance of the contract of the 7th of September, 1888, and alleging in her statement of claim that in pursuance of the said contract she, on the 10th of September, 1888, paid to Mr. Hunting the sum of £375, as a deposit and in part payment of the said purchase money, and submitting that the memorandum of the 7th and the letter of the 12th of September, 1888, formed a valid contract and a sufficient memorandum within the statute of frauds.

Mr. Hunting, by his statement of defence, did not admit any of allegations in the statement of claim, and relied on the statute of frauds. Issue was joined. This was the trial of the action.

Mrs. Oliver in her evidence deposed that she sent the check of £375, mentioned in the letter of the 12th of September, on account of the purchase money of the Fletton Manor House estate. It was part of the £2,375. No other money was payable by her to the defendant. The £375 was the balance that Mr. Hunting was to receive, because the £2,000 was to be paid over to a mortgagee of the property. Her solicitor, Mr. Law, was going to find the £2,000 for her.

KEKEWICH, J. The elementary proposition about which there is no doubt is this,—the memorandum to be signed by the party sought to be charged, so as to bring a particular case within the statute of frauds, need not be on one piece of paper, nor need it be a complete document, signed by the party at one and the same time. It may be contained in two or more pieces of paper, but they must be so connected that you can read them together, so as to form one memorandum of the contract between the parties. Directly you get beyond that, you get into difficulty. One can illustrate that in a simple manner. An intending purchaser accepts an offer made by a proposing vendor thus: "In reply to your letter of the 14th instant." Can one annex to that reply the letter of the 14th instant? Surely one cannot, without inquiring what letter it is; unless the purchaser has, with unusual prudence, completed the reference by saying, "In reply to your letter of the 14th instant, a copy of which is on the other side." In the absence of any such complete evidence as that, one must inquire what the letter of the 14th instant was, because non constat it may have been a reference to any one of half a dozen different letters; and so, from that very simple illustration, one can go through a large variety of more complex ones. It is not for me to say that the old rule was better or worse than the present rule; but that it was a different rule, notwithstanding the criticisms in the cases which Mr. Neville has given me, I have no doubt. I take the old rule from the original edition of Lord Blackburn, on the Contract of

Sale, which is cited—I have not the original work before me—by Williams, J., in *Railway Co. v. Peek*, E. B. & E. 1001, where, after referring to *Hinde v. Whitehouse*, 7 East, 558, and *Kenworthy v. Schofield*, 2 B. & C. 945, he says: “The principle of these cases seems to me to be well stated in the same work by my brother Blackburn, as follows: “If the contents of the signed paper themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing’” (as in the case which I have mentioned of a letter referring to a previous letter, of which the copy is annexed): “but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing.’” The old case of *Boydell v. Drummond*, 11 East. 142, and some other case, might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as “the letter of the 14th instant,” or it might be simply “your letter,” the result might in a large number of cases be gross injustice. Now I take it to be quite settled that in a case of that kind you may give parol evidence to show what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to show whether it was a conversation or a written document; and, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. So far there is no difficulty. That was applied in the case of *Ridgway v. Wharton*, 6 H. L. C. 238, where the question was on the meaning of instructions which did not by any means necessarily point to a written document; but later the cases have gone further than that, and it seems to me that *Long v. Millar*, 4 C. P. D. 450, followed by *Field, J.*, in *Cave v. Hastings*, 7 Q. B. D. 125, does establish a very much larger series of exceptions. In *Long v. Millar*, I profess myself rather embarrassed by the judgment of *Thesiger, L. J.*,—that is to say, I am unable quite to understand what he means by the passages on p. 456, which seem to me rather inconsistent; but seeing that I have the judgments of *Bramwell* and *Baggallay, L. JJ.*, without the slightest doubt or embarrassment, and that *Thesiger, L. J.*, concurred in their judgment, I think I may put any difficulty of that kind aside. *Bramwell, L. J.*, gave a judgment which, beyond its

reference to the particular case, is exceedingly useful as illustrating this branch of law; because he gives an illustration which seems to me to go to the root of the matter. The illustration he gives is this (4 C. P. D. 454): "Suppose that A. write to B., saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A., without infringing the statute of frauds, sec. 4, which requires a note or memorandum in writing." If that is sound, which I take it to be, according to other cases, and according to the convictions of judges in older cases which are introduced into the old law, it is difficult perhaps to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances, with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted. Turning to the case before me, I find a letter of the 12th of September, 1888, written by the defendant to Mrs. Oliver; and in that he says, "I beg to acknowledge receipt of check, value £375, on account of the purchase money for the Fletton Manor House estate, for which I thank you." I have two things here perfectly clear, that there is a property called Fletton Manor House estate, which constitutes the subject of a purchase, and therefore the subject of a sale. I have also that £375 is part of the purchase money for that house; but, beyond that, I have no terms of a contract. I am entitled to consider the circumstances under which the letter was written, in order to give any meaning that I properly can to it,—not to add terms to it, but to find out what the meaning necessarily must be, having regard to the facts and circumstances—and, having got the evidence of which I have in this case, the conclusion is inevitable that it refers to a previous memorandum of terms of agreement under which Mrs. Oliver becomes the purchaser of this particular property for the price of £2,375, on account of which the check for £375 was sent. Having got that evidence in, having got the connection between the two documents, I have then enough to enable me to read the two documents together, and, reading them

together, I have a distinct memorandum of contract, specifying all the terms, the second one supplying what the first one omitted to give namely, singularly enough, the property which was intended to be purchased and sold. That being so, the objection that there is no memorandum within the statute of frauds fails.

I have not referred to the late case of *Studds v. Watson*, 28 Ch. D. 305, before Mr. Justice North, because I am not quite sure how far that learned judge intended to go. If I am right in my view of his judgment that he only allowed the parol agreement to be proved to see whether it connected the two written documents, and then, having got it in evidence, found that it did, and so was able to connect the two documents,—if that is the right view, which I believe it to be, of what he intended,—then it really follows *Long v. Millar*, 4 C. P. D. 450, and *Cave v. Hastings*, 7 Q. B. D. 125, to both of which he referred in his judgment.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.

A MEMORANDUM OF SALE MUST SHOW WHO IS THE BUYER AND WHO IS THE SELLER

FRANK AND COMPANY V. ELTRINGHAM

65 Miss. 281 (1887)

On July 6, 1886, Marcus S. Kahn, the travelling agent of defendants, solicited and obtained an order for a bill of goods from the plaintiff, in the city of Natchez. On August 23, 1886, defendants wrote to plaintiff, addressing the letter to Waterproof, La., requesting references, as they did not know him, and had never previously had business relations with him. Not receiving a reply, they again wrote him on September 16, 1886. Receiving no reply to this letter, they declined to ship the goods at all. Thereupon, on October 18, 1886, Eltringham instituted this action by attachment, the defendants being non-residents.

On the trial of the issue as to the liability of defendants, the plaintiff introduced the following as evidence of the contract of sale.

1. Frank & Co., 47 & 49 White Street, N. Y.

No. 120

Natchez, Miss.

Address A. Eltringham, U. N. I. Landing.

* * * * *

(Here follows an inventory of articles of merchandise, with price of each article separately, amounting in the aggregate to \$384.75.)

Thanks,

SONNY KAHN.

The jury found for the plaintiff, and assessed the damages at \$250. The defendants appealed.

CAMPBELL, J., delivered the opinion of the court.

The note or memorandum of the bargain is not sufficient under 1295 of the Code. It fails to show who is seller and who is buyer. It is impossible to determine from the writing whether the appellants agreed to buy from the appellee, or vice versa.

While the requirement of the statute is that only some note or memorandum of the bargain shall be signed by the party to be charged, it must show the substantial terms of the bargain, so that it may be seen and understood from the writing and without the aid of parol testimony; for to admit that, to supply an essential part of the contract, would defeat the object of the statute. The writing must distinguish between the buyer and seller. The memorandum in this case would be equally applicable to an action by I. Frank & Co. against Eltringham.

Reversed and remanded.

NEGOTIABLE INSTRUMENTS

PARTIES TO A BILL OR NOTE SHOULD BE ASCERTAINABLE

M'CALL V. TAYLOR

19 Common Bench, 301; 115 Eng. C. L., 301 (1865)

This was an action upon an instrument in the following form, which was declared on as a bill of exchange and also as a promissory note:

“£300.00.

Four months after date, pay to my order the sum of Three hundred pounds, for value received.

“To Captain Taylor,

“Ship Jasper.”

Across this document was written, in the handwriting of the defendant, the words “Accepted, William Taylor.”

There was also a count for goods sold and delivered, and the ordinary pleas.

The cause was tried before Byles, J., at the sittings at Guild-hall after the last Hilary Term. The plaintiff was a ship-chandler and provision merchant. The defendant was the captain (and it was suggested owner also) of the ship Jasper. It appeared that the plaintiff had, in September, 1862, pursuant to orders received through one Milne, the ship's broker, delivered goods to the amount of £299. 19s. 2d. on board that vessel for San Francisco, and had received in payment a bill at six months accepted by one Bailey, which bill was not paid at maturity; and that the instrument declared on was given to the plaintiff by Milne about six months afterwards. It also appeared that Bailey had been debited for the goods in the plaintiff's books, and that an invoice had been delivered charging Bailey as the debtor. There was no evidence whatever to show that the defendant had any interest in the goods.

PER CURIAM. I am of opinion that this rule should be discharged. The instrument in question is declared upon as a bill of exchange, and also as a promissory note. It was in this form, “Four months after date, pay to my order the sum of three hundred pounds, for value received,” and it was addressed to the defendant, but it had no date and no drawer's name. Across it was written an acceptance by the defendant.

The question is, whether the holder of this document has a right to declare on it either as a bill of exchange or as a promissory note. It is clearly not a bill of exchange, and in form it is not a promissory note. If I could be clearly satisfied that I should be giving effect to the intention of the parties by holding this instrument to be a promissory note, I would endeavor so to construe it. But I am aware of no case, and the industry of the learned counsel has discovered none, which warrants us in holding this to be either the one or the other. It is an inchoate and imperfect instrument. If the holder had authority to make it a complete instrument either as a bill or a note, he was at liberty to do so; but, if he had no such authority, he might if he attempted to do so render himself liable to a charge of forgery. The case of *Stoessiger v. The South Eastern Railway Company* seems to me to be precisely in point, without going into any of the other cases. Nothing is clearer to my mind than that, in the ordinary case of an acceptance with the drawer's name in blank, it is important, in order to constitute a contract, that it should be known who is to be the drawer. It may have been important here that the instrument should be filled up as a bill drawn by the owner of the ship or the broker upon the captain. And it may be that the plaintiff had no authority to add his name as the drawer. But, whatever may have been the particular circumstances under which this document was given, I act upon the case I have referred to. As it stands, the thing is inchoate and incomplete, and affords no foundation for the holder to sue upon it.

WILLES, J. I am entirely of the same opinion.

BYLES, J. I am of the same opinion. I thought at the trial, and still think, that the instrument in question could not be declared on as either a bill of exchange or a promissory note. It is not like a bill accepted in blank.

MONTAGUE SMITH, J. I also think this case is not distinguishable from *Stoessiger v. The South Eastern Railway Company*, *supra*. There, upon an instrument precisely similar to this, except that there it was dated, *Ld. Campbell* says: "It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be bearer; that *Cruttenden* should become liable generally to the bearer, was quite contrary to his intention." So here, I think we should be going entirely against the intention of the defendant if we were to hold him liable upon this instrument as upon a promissory note payable to bearer.

Rule. Discharged.

PAYEE MUST BE AN EXISTING PERSON CAPABLE OF BEING
ASCERTAINED AND IDENTIFIED

GORDON V. LANSING STATE BANK

133 Mich. 143 (1903)

MOORE, J. This case was tried by the circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

"Monday morning, December 9, 1901, at about 9 o'clock, there was presented at the bank of defendant at the City of Lansing for payment the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

"Lansing, Mich." 190. . . No. . .

"Lansing State Savings Bank of Lansing.

"Pay to the order of—

Nine Hundred and Seventy Dollars:

\$970.00

"JOHN R. GORDON."

"The check was indorsed by Charles P. Downey, and was presented by an employee of Mr. Downey, and cash was paid at the time of its presentation.

"The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was \$3.40, but during the day \$2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for \$970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept that check as a voucher for the money paid.

"December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for \$970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank."

The Circuit Judge rendered a judgment in favor of the plaintiff for \$970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: First, the effect of not dating the check; second, has the check a payee? We do not deem it necessary to discuss the first question. As to the second question, it will be noticed the drawer of the check did not name a payee therein, nor did he leave a blank space where the name of a payee might be in.

sented, nor did he name an impersonal payee. In the case of *McIntosh v. Lytle*, 26 Minn. 336 (3 N. W. 983), the court used the following language.

"A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable, and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement,—that is, that it shall be payable to bearer. So, when a bill, note, or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a bona fide holder may then recover on it.

"These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a bona fide holder, to have had authority to insert a name as payee. In the former cases the instrument is, when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose,—to fix the time of payment,—and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted."

See, also, *Rush v. Haggard*, 68 Tex. 674 (5 S. W. 683); *Prewitt v. Chapman*, 6 Ala. 86; *Brown v. Gilman*, 13 Mass. 160; *Rich v. Starbuck*, 51 Ind. 87; *Norton, Bills & N.* (3d Ed.), p. 59, and notes; 1 *Daniel, Neg. Inst.* # 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to *Crutchly v. Mann*, 5 Taunt. 529.

In this case the bill of exchange was made payable to the order of. The court found that, under the facts shown, the conclusion was irresistible that the name was filled in with the consent of the drawer. The same case was previously reported in 2 Maule & S. 90 (*Crutchley v. Clarence*), where, as the case then stood, it appeared the bill of exchange had been sent out, the defendant leaving a blank for the name of the payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

In the case of *Harding v. State*, 54 Ind. 359, a promissory note was drawn, leaving a blank space for the name of the payee; and it was held:

"So the name of the payee may be left blank, and this will authorize any bona fide holder to insert his own name. Pars. Notes & B. 33."

In the case of *Brummel v. Enders*, 18 Grat. 873, promissory notes, blank as to the names of the payees, has been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers. At the time of the sale the names of the purchasers were inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued, the makers pleaded usury. The court, following the cases already cited, held that any bona fide holder of a bill or note which is blank as to the name of the payee may insert his own name, and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated, not only did Mr. Gordon fail to insert the name of the payee, or to leave a blank where the name of the payee might be inserted, but he did more; he drew a line through the blank space, making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee, but intended to make it impossible for anyone else to do so. Had Mr. Gordon issued a check otherwise perfect, but with the blank space for the amount of the check unfilled and delivered it to a third person, it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank, filled it by drawing a line through it, would anyone say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it

be presumed there was an impersonal payee when the maker has not made the check payable to cash, or some other impersonal payee? In order to construe the check as a complete instrument, we must read into it an intention not only expressed by its language, but contrary to the act of the maker. The check, as it appears today, is without any payee. The record is silent in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a bona fide holder.

Judgment is affirmed.

CERTAINTY AS TO THE TIME OF PAYMENT

KELLEY V. HEMMINGWAY

13 Ill. 604 (1852)

TREAT, C. J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal to the Circuit Court. On the trial, in the latter court, the plaintiff offered in evidence an instrument in these words:

"Castleton, April 27, 1844.

"Due Henry D. Kelley fifty-three dollars when he is twenty-one years old, with interest.

"DAVID KELLEY."

On the back of which was this indorsement.

"Rockton, May 21, 1849.

"Signed the within, payable to Moses Hemmingway,

"HENRY KELLEY."

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument, because it was not negotiable, but the court admitted it in evidence, and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. Chitty on Bills 134. Thus a promise in writing to pay a sum of money

when a particular person shall be married, is not a promissory note, because it is not certain that he will ever be married. *Pearson v. Ganet*, 4 Mod. 242; *Beardsley v. Baldwin*, 2 Strange, 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. *Palmer v. Pratt*, 2 Bing. 185; *Coolidge v. Ruggles*, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will certainly transpire. *Colehan v. Cooke*, Willes, 393; *S. C. 2 Strange*, 1217.

In this case, the payment was to be made when the payee should attain his majority—an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of *Goss v. Nelson* (1 Burr. 226), is clearly distinguishable from the present. There, the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time, or die in the interim; and it was distinctly intimated, that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed.

Judgment reversed.

THE INSTRUMENT MUST BE FOR THE PAYMENT OF A
SUM CERTAIN

DODGE v. EMERSON

34 Me. 96 (1852)

Assumpsit by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for "\$271.25, with such additional premium as may arise on policy No. 50, issued at the Calais Agency."

APPLETON, J. No principle of law is more fully established by authority and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note, it must be for a fixed and certain, and not for a variable amount. In France it is so determined by the provisions of the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country, it has received the sanction of repeated and well considered adjudications. Story on Promissory Notes, § 20. Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.

The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendant's liability being for both these sums, is obviously for an uncertain and indefinite amount.

It is insisted in argument, that the plaintiff may abandon all claim for the additional premium, which is uncertain, and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on, as would discharge the defendants.

In *Smith v. Nightingale*, 2 Stark. R. 375, the promise was to pay the payee sixty-five pounds and all other sums that may be due him, and it was claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the Court decided otherwise. *Davis v. Wilkinson*, 10 Adol. & El. 98.

The inquiry is made by the counsel for the plaintiff whether the clause providing for the payment of an additional sum, introduced after the promise to pay the sum fixed and certain, controls that sum so as to

make it in any event uncertain. The amount due to the plaintiff is uncertain. Whether the contract is to be regarded as a promise to pay one sum, which shall be the aggregate composed of a certain and of an uncertain sum, the amount of which is to be ascertained at some subsequent time, or as a promise to pay two sums, one fixed and the other uncertain, is perfectly immaterial. In either case there is no precise and ascertained amount due by the contract, and it cannot be regarded as a promissory note. If it was not in its origin, it cannot be made one by any abandonment, which the plaintiff may deem it advisable to make of any portion of the sum due him. The contract declared on not being in its character negotiable, the action cannot be maintained by the present plaintiff.

Plaintiff nonsuit.

PROMISSORY NOTES MUST BE PAID IN MONEY ONLY

HASBROOK v. PALMER

2 McLean, 10 (1839)

OPINION OF THE COURT. This action is brought by the plaintiffs as assignees on a promissory note, payable at New York, in New York funds or their equivalent. The defendants demur specially, and for cause of demurrer state that it is not averred in said declaration of what value the said New York funds or their equivalent in the declaration were at the time and place of payment, and that said note is not negotiable.

The Michigan statute in regard to the negotiability of promissory notes is similar to the statute of Anne, which has been generally adopted in this country. And the principal question under this demurrer is, whether the note on which this action is brought, being payable in New York funds or their equivalent is negotiable.

The plaintiffs rely on the decision in the case of *Keith v. Jones*, 9 John. Rep. 120, where it was held that a note payable to A., or bearer, in "New York State bills or specie," was negotiable within the statute, upon the ground that the bills mentioned meant bank paper, which, in conformity with general usage and understanding, are regarded as cash; and, therefore that the meaning was the same as if payable in lawful current money of the State. And also in the case of *Judah v. Harris*, 19 John. Rep. 144, where it was decided that a promissory note, payable at a particular place, in the bank-notes current in the city of New York, was negotiable within the statute.

And it is insisted that the promise to pay in New York funds, or their equivalent, is equivalent to an undertaking to pay in lawful cur-

rent money of the State of New York. That it is generally understood New York funds means specie, or a currency equal to specie, and that the drawer of the note promises, substantially, to pay in current New York money.

In support of the demurrer it is contended that to be negotiable a note must be for the payment of money only, and this is laid down in Chitty on Bills (ed. 1830), 152. He says it is the first and principal requisite, and is established by foreign as well as English law, that a bill or note must be for the payment of money only. That it cannot be for the delivery or payment of merchandise, or other things in their nature susceptible of deterioration and loss and variation in value; nor can it be for payment in good East India bonds or for the payment of money by a bill or note: *Clarke v. Percival*, 2 Bar. & Adol. 660; *Bul. N. P.* 272.

A promissory note not payable in cash or specific articles is not negotiable: *Matthews v. Haughton*, 2 Fairf. 277; *Johnson v. Laird*, 3 Blackf. Rep. 153.

A note payable to A. B., or order, in good merchantable whiskey, at trade price, cannot be sued by an assignee or bearer in his own name: *Rhodes v. Lindley*, Ohio Rep. condensed, 465.

A note for a certain sum, payable to A. or order, "in foreign bills" (meaning thereby bills of country banks), has been held not to be a good promissory note within the statute, and consequently not negotiable: *Jones v. Sales*, 4 Mass. Rep. 245. In the case of *Lieber and Colsin v. Goodrich*, 5 Cowen Rep. 186, the Court held a note payable in Pennsylvania or New York paper currency is not a promissory note for the payment of money within the statute. And in the case of *McCormick v. Trotter*, 10 Serg. & Raw., Rep. 94, the Court decided that a promissory note payable to A. B., or order, for five hundred dollars, in notes of the chartered banks in Pennsylvania, was not a negotiable note on which the indorsee can sue in his own name.

In South Carolina it has been decided that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the statute of Anne and their Act; and on a verdict for the assignee of such a note judgment was arrested: *Large v. Kohne*, 1 McCord, 115; *McElarin v. Nesbit*, 2 Nott & McCord Rep. 519.

The cases cited in the 9th and 19th of John. Rep. seem not to be sustained by the current of decisions in this country and in England and it is difficult to distinguish those cases from the decisions cited so as to maintain their consistency. If this, indeed, were practicable, it is not necessary to the decision of the question raised by this demurrer.

What is understood in this State by New York funds or their equiva-

lent may be a matter of doubt; nor does it seem to be of a nature which can be resolved by evidence, so far as regards the question under consideration.

The term New York funds, it is presumed, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. But whether is meant the funds of the State generally or of the City of New York is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what constitutes New York funds, the face of the note is indefinite. It is, indeed, susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute. It is not a note, in the language of the decisions, payable in money. It is payable in New York funds or their equivalent.

Now what is equivalent to New York funds? The answer is their value, their value in specie or in current paper which passes at a discount. Might not the drawer pay this note in this description of paper, making up the discount? Would not this, in the language of the contract, be equivalent to New York funds? It would be equivalent if of equal value.

The demurrer must be sustained.

AN INSTRUMENT UNDER SEAL IS NOT NEGOTIABLE

CONINE V. THE JUNCTION AND BREAKWATER RAILROAD COMPANY

3 Houst. Del. 288 (1866)

Action on the following instrument:

Gentlemen,—Eighteen months after date please pay to my own order, six thousand nine hundred dollars, for value received, that being the amount which will be due from said State of Delaware to the Junction and Breakwater Railroad Company, January 1, 1862, out of the semi-annual instalments, which will on that day, be due to said State from Richard France under the provisions of the act of the General Assembly of said State, entitled "An Act for the encouragement of Internal Improvements in the State of Delaware," passed at Dover, January 26, 1859, and your receipt indorsed hereon for the share of said corporation of said installment, shall be good against said Corporation.

H. W. McCOLLEY,

Treasurer of the Junction & Breakwater R. R. Co.

To Messrs. France, Broadbent & Co.,

Baltimore, Md.

This instrument was indorsed by said company by the name of H. W. McColley, Treasurer, and accepted upon the face thereof thus: "Accepted, France, Broadbent & Co." The firm of France, Broadbent & Co. was composed of Richard France, Stephen Broadbent, Sr., Stephen Broadbent, Jr., and William C. France. After acceptance the instrument was negotiated with Stephen Broadbent, Sr., who afterwards indorsed and negotiated the same with the said plaintiff. Afterward the said draft was duly presented for payment in Baltimore and payment demanded and refused, of which presentment, demand and refusal the defendant had due notice. Further facts appear in the opinion.

GILPIN, C. J., delivered the opinion of the Court. Considering the third ground of defence taken by the defendant as fatal to the plaintiff's right to recover in this action, I do not propose to express any opinion on the question as to whether the draft, which is the subject of controversy, was or not, according to its terms and meaning, made payable out of a particular fund, nor the other question as to the legal effect of the draft's having been held by Stephen Broadbent, one of the acceptors as an indorsee. Much has been said and well said on this point, but for the reason just suggested, I do not deem it at all material to pass upon them.

By agreement of the parties the original draft is made a part of the case stated, and upon examination of the draft we find that the corporate seal of the company is affixed or impressed upon the paper upon the left of the signature of H. W. McColley, Treasurer of the Company. The usual terms indicating the affixing of the seal, are not found at the end of the draft—they are omitted altogether. If the case had been tried at the bar of the Superior Court before a jury, the fact of, whether the seal had been rightfully affixed to the draft, might have been controverted, notwithstanding the well established legal presumption arising from the presence of the corporate seal affixed to the instrument produced, that it was placed there by competent authority; the rule being that, when the common seal of a corporation appears to be affixed to an instrument and the signature of a proper officer is proved or admitted, the Court is bound to presume that the officer did not exceed his authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority; and the burden of showing that it is wrongfully there rests upon the party objecting to it. *Lovitt v. The Steam Saw Mill Association*, 6 Paige 54. *The President, Manager and Company of the Berks and Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawle 12. *Baptist Church v. Mulford*, 3 Halst. (N. J.) 183. *The case of St. Mary's Church*, 7 Serg. & Rawle 530. *The proprietors of the Mill Dam Foundry v. Hovey*, 21 Pick. 417. *Phillips v. Coffee*, 17 Illinois 154. *Johnson v.*

Crawley, 25 Ohio 316 Potter et al. v. Androscoggins & Kennebec R. R. Company, 37 Maine 316.

But in this case, the question as to whether the seal is rightfully or wrongfully on the draft cannot be raised. For the parties have made the seal itself, just as much as the body of the draft or the signature of the Treasurer, a part of the case stated, without suggesting the slightest doubt of it being there properly. Indeed, it is alleged in the case stated that the draft, after it was indorsed by H. W. McColley, Treasurer of the Junction and Breakwater Railroad Company, was sent by a duly appointed committee of said company to Baltimore for acceptance, and was there accepted by France, Broadbent & Co. It passed from the hands of the Treasurer to the committee (of course with the seal on it—for it does not appear that it ever afterwards returned to the hands of the Treasurer)—was sent by them to Baltimore, was accepted by the drawees, was negotiated by the company and is now produced by the plaintiff with the seal on it and made a part of the case stated. All this amounts to an admission that the seal was placed on the draft rightfully and not surreptitiously, improperly or fraudulently. But aside from this admission, the presence of the seal on the draft, in the absence of evidence or statement impeaching its correctness, concludes the question here, as to its having been affixed by proper authority.

The more approved mode of executing a deed by a corporation, is to conclude the instrument by saying "In testimony whereof the common seal of the said corporation is hereunto affixed." But this is not necessary to the validity of the instrument. Nor is it necessary to name or refer to the seal at all. *Mill Dam Foundry v. Hovey* 21. Pick. 417. *Godard's Case* 5 Co. R. 5. Com. Dig. *Fait a 2.* 2 Ser. & *Rawle R.* 504. In the case of *Mill Dam Foundry v. Hovey*, the instrument concluded in the words, "In witness whereof we have hereunto set our hands;" and the seal consisted of a wafer and a small bit of paper stamped with a common desk seal of a merchant. And it was contended that this was not the seal of the corporation, the words of in testimonium being, "we have hereunto set our hands" merely. But the Court thought otherwise, and decided that it was the deed of the parties, declaring that it had been settled that words indicating that the parties had affixed their seals, were not absolutely necessary.

The question reserved for the decision of this Court is this: whether the instrument of writing sued on and described as a bill of Exchange, does in fact and in law constitute a valid bill of exchange, so as to entitle the present indorsee and holder, William C. Conine, the plaintiff, to sue and recover upon it as such. In other words, is it transferable by mere indorsement, so as to entitle the holder by force of such indorsement, to maintain an action upon it, in his own name.

At the common law, choses in action could not be assigned, so as to give the assignee a right of action in his own name. Bills of Exchange, however, have always constituted an exception to this rule.

The origin of the latter is involved in some obscurity. It is very questionable whether they were known to the nations of antiquity. But whether they were invented by the Jews and Lombards (as some writers have supposed), during the thirteenth century, and after their banishment, in order the more readily to draw their efforts out of France and England; or by the Gibelines, upon their expulsion from Italy by the Guelphs, in order to avoid confiscation of their effects by their enemies, certain it is that we find them to have been in use among the maritime and commercial communities, inhabiting the shores of the Mediterranean as early as the fourteenth century; from which region, it is most probable, they were introduced into England about the year 1381.

The facilities which they afforded for the safe transmission of money, or values, from one country to another, soon brought them into general use among merchants; and the use of them becoming an established custom, it is believed they received judicial recognition at a very early day, although no authentic decision in regard to the custom, can be found prior to the time of James the First, 1603. The first case of which we have any knowledge, is that of *Marten v. Boure* reported Cor. Jac. 6-7. The declaration in the case, which is set out in the report, describes the cause of action as a bill of Exchange, "signed with his Hand secundum usum mercatorum." And from that day to this, no case can be found in the books, of a bill of exchange with a seal affixed to it.

The most solemn and authentic act, as matter of contract, for finally and conclusively binding men to the observance of good faith toward each other, known to the civil law, was called a stipulation; it was entered into before the civil magistrate upon questions and answers, carefully propounded and taken in writing, and to show that there was no surprise, and that the contract of the parties was their maturely considered and deliberate act. It could only be impeached by fraud.

Deeds, by the common law, are strikingly analogous to the ancient stipulation of the Civilians. The ancient forms and ceremonies prescribed by the common law, for proper authentication and establishment of a deed, were writing, sealing and delivery, and if the parties were illiterate, also reading of the instrument, all indicating a solemn and deliberate act, intended to be final and conclusive between the parties. Sealing was an essential element though signing was not.

Authentic history informs us, that seals come down to us from the most remote antiquity, and were originally derived from the nations of

the far East. The Scriptures declare that the "writing that is written in the King's name, and sealed with the King's seal, can no man reverse." Writings under seal constituted part of the formalities of a Jewish purchase of land. "And I bought the field of Hanameel, and weighed him the money, and subscribed the evidence and sealed it, and took witnesses." See Jeremiah, chap. 32, 1 Kings, chap. 21, Esther, chap. 8, Daniel, chap. 8, 9.

Seals, however, did not come into general use in England until after, or about the time of, the conquest; indeed, prior to that time, they were almost entirely unknown to our English ancestors; and, probably, the most ancient authentic sealed document in England, is the charter granted by Edward the Confessor to Westminster Abbey, A. D. 1017.

Deeds or sealed instruments, are not only of much higher antiquity than bills of exchange, but they are of a totally different origin. They cannot be said to be made *secundum usum mercatorum*, since they find their recognition and validity in the more ancient rules of the common law. On the other hand, bills of exchange find their origin and sanction in the usage and custom of merchants, the *lex mercatoria*, a particular or peculiar system, which, being in the interest of commerce, became at length gradually ingrafted into, and established as a part of the common law itself. By the common law, contracts are distinguished into two kinds,—contracts under seal, which are specialty, for no contract, by that law, is held to be a specialty unless it be under seal, or a matter of record. But notwithstanding a bill of exchange is only a simple contract, it nevertheless differs from other simple contracts in two very important particulars, namely, its negotiability, and its presumed valuable consideration. At common law no chose in action was assignable, until bills of exchange became by force of the custom of merchants, the exception to the general rule. Notes were made assignable in 1704 by the statute 3 and 4 Anne. Bonds and specialties, as well as notes, are made assignable by our statute;—the last by simple indorsement, the two former "under hand and seal" and before at least two credible witnesses. Chap. 63, sec. 8. Revised statutes. If a specialty had been assignable by mere indorsement, where would have been the necessity for this statutory provision? The distinction between a bill of exchange and a specialty, is found noticed in almost all elementary works on contracts—Chitty on Contracts 3, 4. Chitty on Bills 12, 13. Story on Bills, sec. 16. 2 Blac. Com. 465, 466. All contracts under seal are specialties, sealing and delivery being the particular form and ceremony which alter the nature and operation of the agreement. Forms, consecrated by time and usage, become substance. The seal is substance and changes the nature and operation of the contract. It seems to

me therefore, that the question which I have been considering, is settled upon principle against the plaintiff. But however this may be, it has been held as settled upon authority for more than thirty years past.

In the case of *Warren v. Lynch*, 5 Johns. 239, it was conceded by counsel on both sides, and by the court, Chancellor Kent, then Chief Justice, presiding and delivering the opinion, that a sealed note is not negotiable.

In the case of *Clark v. The Farmers' Woolen Manufacturing Company of Benton*, 15 Wendell R. 256, it was held by the Supreme Court of the State of New York, first, that a note for the payment of money under seal, though in all other respects like a promissory note, was not negotiable, and that an action could not be obtained upon it in the name of a person to whom it had been transferred; secondly, that the effect of affixing the seal of a corporation to a contract, is the same as when a seal is affixed to the contract of an individual; it renders the instrument a specialty.

I am not aware that this decision has ever been overruled, or even doubted.

We are therefore of opinion that the plaintiff is not entitled to recover on this action.

A SIGNATURE MAY BE IN ANY MARK OR FIGURE PROVIDING IT IS MEANT AS AN INDORSEMENT

BROWN V. THE BUTCHERS' AND DROVERS' BANK

6 Hill, 443 (1844)

On error from the Superior Court of the city of New York where the Butchers' and Drovers' Bank sued Brown as the indorser of a bill of exchange, and recovered judgment. The indorsement was made with a lead pencil, and in figures, thus, "1, 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as indorser, though it also appeared he could write. The Court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. Exception. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown, thereupon brought error.

NELSON, C. J. It has been expressly decided that an indorsement written in pencil is sufficient: *Geary v. Physic*, 5 Barn. & Cress. 234; and also that it may be made by a mark: *George v. Surrey*, 1 Mood &

Malk. 516. In a recent case in the K. B. it was held that a mark was a good signing within the statute of frauds; and the Court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference: (*Baker v. Dening* 8 Adol. & Ellis, 94; and see *Harrison v. Harrison* 8 Ves. 186; *Addy v. Grix* 8-Ves. 504).

These cases fully sustain the ruling of the Court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.

Judgment affirmed.

ACCEPTANCE MAY BE VERBAL UNLESS REQUIRED BY STATUTE TO BE IN WRITING

COOLIDGE, ET AL. V. PAYSON, ET AL.

2 Wheaton (U. S.) 66 (1817)

MR. C. J. MARSHALL. This suit was instituted by Payson & Co., as indorsers of a bill of exchange drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill on which the name of John Randall was indorsed, offered for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful owners. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but, from the sentence of acquittal, the captors had appealed to this court. Pending the appeal Cornthwaite & Cary transmitted to Coolidge & Co. a bond of indemnity executed at Baltimore with scrolls in the place of seals, and drew on them for two thousand seven hundred dollars. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance.

After its protest Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for two thousand dollars will be honored."

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and, of course, see the propriety of our having one, not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co., in part of the protested bill of two thousand seven hundred dollars, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict.

The court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was

satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action: and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declaration aforesaid, did exceed the private instructions given to him by Coolidge & Co. in their letter to him.

To this charge the defendants excepted. A verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Carey contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Carey to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Carey, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose v. Van Mierop & Hopkins* (1765), (3 Burr., 1663), (1765), the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under consideration of the court, no essential distinction is perceived. But, it is contended, that the authority of the case of *Pillans & Rose v. Van Mierop & Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.* (Cowp., 571), the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Ld. Mansfield, in delivering his opinion, contradicted those laid down in *Pillans & Rose v. Van Mierop & Hopkins*. His lordship observes, "it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

In the case of *Pillans & Rose v. Van Mierop & Hopkins* had been understood to lay down the broad principle that a naked promise to accept, amounts to an acceptance, the case of *Pierson v. Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Ld. Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Ld. Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances," but it is not said that the answer must contain those circumstances. In the case of *Pierson v. Dunlop*, the answer did not contain such circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will

give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt* (1779) (1 Doug., 296 (1779), *Ld. Mansfield* said, "there is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes as absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from *Cowper* (*Cowper*, 571), and *Douglass* are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction, but the mere circumstances, that the bill was taken for a pre-existing debt had not been thought sufficient to do away with the effect of a promise to accept.

In the case of *Johnson and another v. Collings*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, *Le Blanc, J.*, lays down the rule in the words used by *Ld. Mansfield*, in the case of *Pierson v. Dunlop*. *Ld. Kenyon* said, in that case, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it. In *Clarke and others v. Cock* (4 East, 57), the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case (*Clarke v. Cock*), they unan-

imously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that to be a virtual acceptance. It is true, in the case of *Clarke v. Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of promise; but no case had been decided on this distinction; and in *Pillans & Rose v. Van Mierop & Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a verbal acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

NECESSITY OF ENDORSEMENT

HULL V. CONOVER

35 *Ind.* 372 (1871)

DOWNEY, C. J. This suit was commenced by William Conover against the appellant, before a justice of the peace, where there was judgment for the defendant. The plaintiff appealed to the Circuit Court, where the death of William Conover was suggested, and his executors made parties plaintiffs in his stead. There was judgment in the Circuit Court for the plaintiffs, from which the defendant appealed to this Court.

The first point presented to us is, that the cause of action is insufficient. It consists of the following note.

"150.00

Covington, June 15, 1868.

"Eighteen months after date I promise to pay to the order of Hiram Abdill one hundred and fifty dollars, value received, without any relief from valuation or appraisement laws. Interest from date six per cent.

DANIEL HULL."

There is no indorsement on the note by Abdill to William Conover, or to the appellees, and there is, therefore, nothing to show any right in him or them to maintain the action. See *Well v. Trotter*, 4 Blackf. 12; *Vandagriff v. Tate*, Id. 174; *Hamilton v. Ewing*, 6 Blackf. 88; *McDonalds' Treat.* 68, 69. This is not a mere defect of parties.

The judgment is reversed, with costs, and the cause remanded.

WHERE THE RATE OF INTEREST IN A NOTE WAS CHANGED
FROM SIX TO SEVEN PER CENT WITHOUT THE CON-
SENT OF THE SURETY, THE SURETY IS RELIEVED FROM
LIABILITY

HARSH, ET AL. V. KLEPPER

28 Ohio St. 200 (1876)

WRIGHT, J. This was an action upon a promissory note, dated April 15, 1865, at one year, which Harsh had signed as surety for the other makers, John H. Tressell and L. R. Tressell.

The defense of Harsh was: First, that after he had signed the note and it had been delivered, it was altered in this, that the rate of interest was changed from six to seven per cent. It was claimed and the jury found that the alteration was made by John H. Tressell, one of the principal makers, with the consent or by the direction of plaintiff, without intent to injure or defraud Harsh, but without his knowledge or consent.

It is claimed that this is a material alteration, and such as discharges Harsh, the surety.

There was a further defense, to the effect that, after the note became due, the plaintiff agreed with the principals to extend the time of payment for two years, without the knowledge or consent of the surety, and therefore he claims to be discharged.

As the decision does not rest upon this second defense, it is merely mentioned without further discussion.

The issue upon the first defense, of material alteration, having been made, evidence was given tending to show that fact. Whereupon said Philip Harsh asked the Court to charge the jury that if they should find that said note had been altered as above stated by changing the rate per cent from six to seven, at the request of the said plaintiff, and without the knowledge or consent of said surety that then the said surety was released from his liability on said note.

This instruction the Court refused, but the Court did charge the jury that "the alteration of the note sued on, at the time of or soon after its maturity, by and at the original suggestion of John H. Tressell, one

of the makers and principals thereof, by erasing the word 'six' in said note as originally written, and writing in its stead the word 'seven,' so as to make the note read 'seven per cent interest from date,' instead of 'six per cent interest from date,' although such alteration was made in the presence of and with the consent and by the direction of the said plaintiff, payee and owner of said note, and without the knowledge or consent of said surety, Harsh, would not prevent the plaintiff from recovery on said note against said surety, Harsh, unless the plaintiff at the time of giving such consent and direction, in fact, designed and intended thereby to injure and defraud the said Harsh. If such consent or direction to make such alteration was given by said plaintiff, and he at the time, in fact, intended thereby to injure and defraud the said Harsh, you should find a verdict for the said Harsh.

The question then is, is a change in the rate of interest, made by the principals with the consent of the holder and owner, but without the knowledge or consent of the surety, a material alteration and such as will avoid the note, as against the surety, though no fraudulent intent in such alteration appear.

The question appears to be well settled upon authority.

In the case of *Wallace & Park v. Jewell*, 21 Ohio St. 163, the name of another person as maker was added to the note after its delivery, and this was held to be such a material alteration as to vitiate the paper against the other makers. Says White, J. (p. 174), "Such an addition gives a different legal character to the instrument. The defendants might, by the altered condition of the note now in question, have been subjected to change of jurisdiction in the event of any litigation arising in relation to it between the parties."

In the case of *Boalt v. Brown*, 13 Ohio St. 364, the note promised to pay \$500 "in ten days' notice, at ten per cent.;" the words added were "with interest annually." It was held that this was a material alteration and discharged a surety. This addition gave the payee the right to collect interest annually, while without it, interest could only have been collected with the principal, and neither without ten days' notice.

In this case it is held that the intent with which the alteration is made cannot vary the result; the contract is not the contract which the surety signed; the terms of the altered note were never assented to by him, and he is not therefore bound. In *Patterson v. McNeely's Adm'rs*, 16 Ohio St. 348, the note had this clause: "The above to be at ten per cent. interest annually." The alteration consisted in inserting the word "paid" before "annually," so as to make the note read "ten per cent. paid annually." This was held to be a material alteration which discharged the surety. The added word required that the interest should

be paid at the end of each year, and if not so paid, interest might be computed upon the interest, which could not be done as the note stood originally. The note therefore was not the note the surety had signed.

In the case of *Brown v. Jones*, 3 Porter (Ala.) 429, the words added were "with interest from the date." This was held to be a material alteration. In this case the defendant was the maker of the note, and his plea was held good. In *Boalt v. Brown*, 13 Ohio St. 364, and *Patterson v. McNeely*, 16 Ohio St. 348, the defendants were sureties seeking to defend themselves. In *Warrington v. Early*, 2 El. & Bl. 763, a note was made payable "with lawful interest;" subsequently, without the assent of the maker, there was added in the corner of the note "interest at six per cent. per annum." Held to be a material alteration and no recovery could be had against the maker.

In *Waterman v. Vose*, 43 Me. 504, the words "with interest" were added. Defendant was an accommodation indorser, and the addition was held to discharge him. The Court below had said that if the addition was made without fraud, the defendant would not be discharged. This ruling however, was reversed, by the Supreme Court of Maine stating the grounds of the doctrine to be two-fold. The first, that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud without the risk of losing, if detected. The other to insure the identity of the instrument, and prevent the substitution of another, without consent of the party concerned. This is the ground assumed by Mr. Greenleaf, 1 Greenl. Ev., § 565. The Court says: "In this case the defendant assumed a liability for the sum of \$260 at the end of seven months, and no other. The alteration made the note for a larger sum at the same time."

In *McGrath v. Clark*, 56 N. Y. 34, defendant indorsed a promissory note with the time and place of payment in blank, and delivered the same to the maker, who filled the blanks, and added the words "with interest." It was held, that though the maker was authorized to fill the blanks as to time and place of payment, yet he was not authorized to add the words "with interest," and it was such a material alteration which discharged the indorser. The Court says that the maker had no more right to add the words "with interest," than to increase the amount of the note. That was already fixed at so many dollars, and adding interest would necessarily increase such amount.

In *Dewey v. Reed*, 40 Barb. 16, the note was already drawn "with interest," but afterward this was added, "interest to be paid semi-annually." This was such a material alteration as invalidated the note against a surety.

In *Fay v. Smith*, 1 Allen, 477, it is held that the alteration of a note

by the addition of the words "with interest" avoids the note as to such promissors as do not consent thereto, although the alteration is made without fraudulent intent. In its opinion the Court says: "There seems to be no difference in principle between this case and one where a note should be signed by two persons for the sum of \$300, and one of them, supposing he had authority from the other, but really without his consent, should strike out the words 'three hundred dollars,' and insert in their place 'five hundred dollars,' and then negotiate the note. The other signer would be wholly discharged, not on the ground of fraud or forgery, but of want of authority to bind him. The note used, he did not execute; the note which he executed was never used but was destroyed by the alteration and another substituted for it."

In *Lee v. Staboid*, 55 Me. 491, the note was "on demand and interest," and the words, "at nine per cent." were inserted, and rendered the note void.

Two cases in 33 Missouri held that the addition of the words "bearing ten per cent. interest," avoids the note: *Ivory v. Campbell*, 33 Mo. 398; *Presbury v. Michael*, 33 Mo. 542.

In *Hart v. Clouser*, 30 Ind. 210, the addition of a clause fixing the rate of interest was held to avoid the note as to a surety.

These authorities, and others that might be cited, clearly establish the proposition that such an alteration as that alleged in this case is material, and operated to discharge the surety, entirely independent of any question of intent. The alteration from six to seven per cent. was an alteration in terms, but did not change the legal effect of the note. Under the interest laws of the State, no more than six per cent. could be recovered. A contract, therefore, for seven per cent, was void, and a specification of that rate in the note was altogether nugatory, and did not vary the import of the paper.

The contract is certainly changed in words, though perhaps the law will not enforce it as to the usurious part of the interest. It is rather a case of defective remedy. The interest law says that parties shall be entitled to receive interest at the rate of six per cent. per annum, and no more: 1 S. & C. 742. Of course, that means they shall receive no more at the hands of the law. But parties are not prevented from making contracts for higher rates of interest and keeping them, if they choose so to do, though the law may not compel them. As is said in *Rains v. Scott*, they are contracts "which the parties were not forbidden to make." Under the statute of frauds there are certain parol contracts upon which an action cannot be maintained, yet the contracts are not absolutely void: *Mims v. Mims*, 15 Ohio, 671; *Woods v. Dille*, 11 Ohio, 455. But if it be that the contract for seven per cent. is illegal, and therefore the

import of the paper is not changed, but remains at six per cent. still, then certainly that alteration which changes the note from a legal to an illegal contract, must be a material alteration.

The contract was for six per cent.; it is now seven. It cannot be the same thing if one was legal and the other not.

The argument, therefore, which proves the alteration not material, by showing that the legal import of the paper is the same, whether the rate be six or seven answers itself, when it also shows that the contract at six is lawful and at seven is not.

This illustration may serve to show what is meant by varying the legal import of paper.

A note is given containing the words "with interest." Upon examining it subsequently, the recipient, perhaps not being well versed in the law, says to himself: "I was to have six per cent. interest, and this does not say so. The intention of the parties is not fully expressed."

He therefore inserts the word "six." This could not be claimed to be a material alteration. The note only now expressed what the parties had before intended. And this is a just criterion. If the alteration only says what the parties meant, it is a harmless one. But can it be, in the case at bar, that the change only expressed what the parties meant in the first place? Can it be claimed that when six was originally written seven was intended? Or does the note, in its new shape, evince the idea as it was at the time of the execution of the paper?

Another consideration shows the materiality of this alteration. If this note were sued on in New York, where the legal rate is seven per cent. that rate of interest could be recovered, unless the defense was made that such recovery was against the law of Ohio, where the paper was executed. The defendant would then be put to the trouble and expense of proving what the law of Ohio was, as he would be compelled to prove any other fact. And an alteration that required a defendant to furnish other or different proof is material. So any alteration which changes the evidence or mode of proof is material: 2 Pars. N. & B. 54-582.

We conclude, therefore, that this is a material alteration. The identity of the paper is destroyed and the surety has the right to say, in *hoc foedere non veni*.

The defendant made a motion for judgment *non obstante*. The special verdict of the jury, in answer to the third interrogatory, that the note was altered by one of the principals with the consent or by the direction of the plaintiff, and in answer to the fifth, that it was without the consent of the surety, Harsh.

As we understand the law, a material alteration of a note, by a prin-

cipal, with the consent of the owner and holder, and without the consent of the surety, discharges such surety.

By § 277 of the Code, "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the Court may give judgment accordingly." Upon these findings, therefore, the defendant is entitled to judgment.

The case will be remanded to the Common Pleas, with directions to reverse the judgment of that Court, and enter judgment for defendant.

PRESENTMENT FOR ACCEPTANCE MUST BE PROVED

CHEEK V. ROPER

5 Esp. 175. (1805)

Assumpsit on a bill of exchange against defendant as drawer.

The declaration stated in the usual form that the defendant drew his bill of exchange for £60 on one J. Hammond, a tanner, in Bristol, which was duly shown, and presented to the said Hammond for his acceptance, etc., who refused to accept or pay the same by reason whereof the defendant became liable.

To prove the fact of the bill having been presented to Hammond for his acceptance, the plaintiff proved that the bill was sent by the witness, who was called, who carried it to the place which was described to him as Hammond's house, he offered it to some person in a tan-yard, who refused to accept it; but he did not know Hammond's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so.

Lord Ellenborough said that the allegation respecting the bill was a material one, as the drawer could only become liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on Hammond, and was therefore insufficient so that the plaintiff could not recover on the bill. Some evidence must be given of an application to the party first liable.

WHERE THE MAKER OF A NOTE HAS NO PLACE OF BUSINESS, A PRESENTMENT AT HIS RESIDENCE AT 9.00 P. M. ON THE DAY OF MATURITY IS GOOD

FARNSWORTH V. ALLEN

4 Gray Mass. 453 (1855)

Action of contract against the indorser of the following promissory note:

"Boston, May 23, 1854.

"Three months after date I promise to pay to the order of Walter M. Allen one hundred and fifty dollars, value received.

"FRANCIS FREEMAN."

At the trial in the court of common pleas, a witness testified that he received the note, at the close of bank hours on the last day of grace, from the Grocers' Bank in Boston, who had received the note for collection from the Cambridge Market Bank, but did not know the residence of the maker or indorser; that he inquired of a director of the Cambridge Market Bank, and learned that the maker lived at Winchester and the indorser at North Cambridge; and the same afternoon carried the note to a notary public in Charlestown, and told him where the parties resided.

The notary public testified that, as soon as he could after receiving the note for protest, he went to the house of the maker, (about ten miles from Boston,) and arrived there about nine o'clock in the evening; that there was no light in the house, and the inmates appeared to have retired for the night; that he rung the bell, and after some time the maker came to the door with a light; and he presented the note, stated its contents, and demanded payment, which the maker refused, saying that he could not, or should not, or would not pay it; that he returned with the note to Charlestown, and on the same evening put in the post office a proper notice of dishonor, addressed to the defendant at North Cambridge.

The defendant contended that the demand proved was not sufficient to charge the indorser. But Hoar, J., ruled otherwise, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

BIGELOW, J. The note declared on, not being payable at a bank, or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established,

by which to determine the hour beyond which a presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise. (*Barclay v. Bailey*, 2 Campb. 527; *Triggs v. Newnham*, 10 Moore, 249, and 1 Car. & P. 631; *Wilkins v. Jadis*, 2 B. & Ad. 188; *Cayuga County Bank v. Hunt*, 2 Hill, N. Y. 635.).

Judgment affirmed.

A PURCHASER WHO PAID \$5.00 FOR A PROMISSORY NOTE
OF \$300 EXECUTED BY A SOLVENT MAKER IS
NOT A BONA FIDE HOLDER FOR VALUE

DE WITT v. PERKINS

22 Wis. 451 (1868)

Appeal from the County Court of Milwaukee County.

Action on defendant's promissory note. The Jury, by direction of the court, found for the plaintiff; and the defendant appealed from the judgment. The question in dispute will sufficiently appear from the opinion.

DIXON, C. J. The plaintiff, knowing the defendant, and that he was in fair credit and able to respond, purchased, shortly before its maturity, a promissory note against him for three hundred dollars and interest for six months, paying therefor only the sum of five dollars. As between the defendant and the payee, the note was invalid for want of consideration. Is the plaintiff a bona fide holder for value, so as to protect him against the defense of a want of consideration? We answer, no. The consideration paid by him was merely nominal. It is as if the note had been given to him, and he should claim the protection

afforded a bona fide holder for value. It appears on the face of the transaction that it was not a negotiation of the note in the usual course of business, but that the sum exacted on the one side and paid on the other was to give that the semblance of a sale, which otherwise was intended as a mere gift, or, what is worse, a shift to get the note out of the hands of the payee so as to cut off the defense of the maker, for the payee's benefit. Either view is equally fatal to the action of the plaintiff, provided the defense of a want of consideration is established.

Again, the buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of mala fides. It is constructive notice of the invalidity of the note in the hands of the seller—such as to put the purchaser upon inquiry, which if he fails to make, he acts at his peril. (Brown v. Taber, 5 Went., 566; Mathews v. Poythress, 4 Ga., 287, 299 et seq., and cases cited; Anderson v. Nicholas, 28 N. Y., 600; Whitbread v. Jordan, 1 Younge & Collyer (Exch.), 303, 328; Jones v. Smith, 1 Hare 68; 1 Parsons on Notes and Bills, 254, 259–60.) The proof offered to show a failure of consideration should have been received, and the case submitted to the jury on this ground.

Judgment reversed, and a new trial awarded.

LIABILITY OF A CORPORATION ON AN ACCOMMODATION NOTE

MONUMENTAL NATIONAL BANK V. GLOBE WORKS

See under Corporations, page 379

INDORSEMENT BY PARTNERS

ESTABROOK V. SMITH

6 Gray, 570, 66 Am. Dec. 443 (1856)

Action of contract upon a promissory note, made by the defendant, payable to "Estabrook & Richmond or order," and indorsed by Richmond in his own name, for the purpose of transferring his interest therein to his copartner, Estabrook, the plaintiff. The parties submitted to the decision of the court the question, whether this indorsement was sufficient to enable the plaintiff to maintain an action thereon in his own name.

DEWEY, J. We take the rule to be uncontroverted, that a promissory note payable "to A. B. or order" cannot be transferred, so as to give a right of action in the name of a holder, not the original party,

without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, Estabrook & Richmond, promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plaintiff, as payee of the note, is obvious; as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question therefore, is, whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee?

The payees of the note are Estabrook & Richmond, who compose a partnership. An indorsement of the note by the payees would therefore be an indorsement by Estabrook & Richmond, and this would correspond with the form of the note, and transfer the note by indorsement, but he must do it by indorsing the partnership name. Anything less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorsement is sufficient to authorize an action by the other partner, Estabrook, as indorsee. The position taken is, that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs, as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee. As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the payees, Estabrook & Richmond, must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be quite competent for the payees, Estabrook & Richmond, in their partnership name, to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee under such circumstances. The case of *Goddard v. Lyman*, 14 Pick. 268, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case.

In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case, upon its facts, does not therefore furnish any precedent for this case; although some of the remarks as, found in the opinion of the court, might seem to indicate a broader doctrine than the case required.

The plaintiff then had leave to amend, on terms, by joining the other partner, and had judgment for the amount of the note.

PRESENTMENT TO PARTNERS

FOURTH NATIONAL BANK V. HEUSCHEN, ET AL.

52 Mo. 207 (1873)

Appeal from St. Louis Circuit Court.

ADAMS, J., delivered the opinion of the court.

This was an action on a negotiable promissory note, by the plaintiffs, as holders for value before maturity, against the makers and indorsers.

The note was made by a partnership composed of the defendants, Frederick W. Heuschen, Frederick Krite and Frederick Perschbacker, whose firm name was "Heuschen, Krite & Co." It was executed to the defendant, John H. Schaaless, who indorsed the same to Wilhelm Ricke, and Ricke to the defendant, Frederick W. Heuschen, and he to the plaintiff.

At the close of the evidence the plaintiff asked the following instructions, which were refused by the court and exceptions duly saved:

"1. The court declares the law to be that service of notice of protest by a notary, through the hands of a clerk, is sufficient to charge the indorsers, and the notarial certificate verified by affidavit is evidence of such service."

"2. If the court, sitting as a jury, believe from the evidence that at the maturity of the note it was placed in the hands of a notary public who during business hours of that day presented the same for payment at a place of business bearing the sign of Heuschen, Krite & Co., a place where said firm had been doing business for several years and which a person in charge thereof then and there represented as the place of business of Heuschen, Krite & Co., to which place plaintiff had been directed by one of the partners as their place of business about ten days previously, and which the same partner designated to the notary as their place of business on the day of maturity, and that furthermore said notary pre-

sented said note for payment to F. W. Heuschen, a member of said firm, in person on the same day, then there was sufficient demand to charge the indorsers although the court may believe that a dissolution of said firm had in fact taken place previous to the maturity of said note.

The court then at the instance of the defendants and against the objections of the plaintiff gave the following declaration:

"If the makers of the note sued on in this cause had a place of business in the city of St. Louis, but the individuals, or either of them, composing the firm of Heuschen, Krite & Co., resided in the said city of St. Louis, it was the duty of the notary to demand payment of said note of the makers thereof or either of said makers at their place of residence or the place of business of any one of them."

The case had been submitted for trial to the court sitting as a jury, and when the court refused the plaintiff's instructions and allowed those of defendants, the plaintiff took a nonsuit and by leave moved to set it aside, which motion being overruled he appealed to general terms when the judgment of special term was reversed and the cause remanded, and the defendants have appealed to this court.

On the trial at special term the plaintiff gave evidence tending to prove the facts as set forth in the second instruction, but failed to give any evidence in regard to the notice by the notary's clerk, and it will be unnecessary to pass upon the plaintiff's first instruction. The bill of exceptions shows that there were two similar cases tried by the court at the same time and the first instruction may have had reference to the other case.

The indorsers of a negotiable note are only liable in case due diligence has been used to make a demand of payment from the makers and due notice given to them in case the note is dishonored.

Where the facts are agreed on, due diligence in making a demand is a question of law; but when the facts are not agreed on, the question of due diligence becomes a mixed question of law and fact. That is the jury are to find the facts and the court is to pronounce the law upon the facts as they may be found by the jury. The usual way is to state in the instruction hypothetically the facts to be found from the evidence by the jury, and to pronounce upon those facts so to be found, the conclusion of law resulting therefrom. This mode was pursued in the second instruction asked by the plaintiff: The evidence strongly tended to prove the facts as hypothetically put in that instruction. Those facts, if found to be true, in my judgment, as a matter of law, constituted due diligence in making a demand of payment on the makers of the note so as to fix their responsibility so far as such demand was necessary. A personal demand of payment on one of the parties was sufficient,

although such demand may have been made after the dissolution of the firm, or a demand made in good faith at the late place of business of such firm, made on information, whether true or false, received from a member of the firm that such place was the proper place to make the demand, would constitute due diligence. A partnership, although dissolved, must be treated as still in existence so far as the question of demand, protest and notice is concerned, and the acts of one partner in such case must be considered as binding on all the others. Therefore the facts indicated in plaintiff's second instruction constituted not simply due, but extraordinary diligence in making demand of payment of the makers of the note.

The instructions given at the instance of the defendants did not cover the whole case as made by the plaintiff. The plaintiff had the right to have his case as made by the evidence presented by a proper instruction.

The judgment at General Term will therefore be affirmed.

The other judges concur.

AGENCY

AN AGENCY MUST BE BASED ON A CONTRACT BETWEEN THE PRINCIPAL AND THE AGENT

HATCH V. SQUIRE

11 Mich. 185 (1863)

Squires replevied property which one Hatch had taken possession of as the agent of McCormick. On the trial considerable evidence was given by plaintiff of the acts, declarations and promises of one Walker whom plaintiff alleged to be the agent of McCormick. Defendant objected to this evidence upon the ground that there was no evidence that Walker was such agent. Judgment for plaintiff and defendant brought error.

MARTIN, C. J. This case hinges almost entirely upon the admissibility of the acts and declarations of Walker—who purported to act as the agent of McCormick—without proof of such agency. The authority of an agent must be positively shown, either by proving his authority to act, or by proving his acts with the knowledge and recognition of his principal. In this case nothing of the kind was accomplished or attempted. The only attempt to prove the agency of Walker was by proving his own acts and assertions. This is insufficient. As these would not bind McCormick, so they would not bind the plaintiff in this cause. It is too obvious to need demonstration that an agent's authority cannot be proved by his own assertion alone. There must be some evidence of authority beyond his assertions, or of ratification of his acts before any party can be bound by such acts.

There was error, therefore, in admitting evidence of the acts, declarations and promises of Walker; and the judgment must be reversed, with costs, and a new trial granted.

DISTINCTION BETWEEN AN AGENT AND A SERVANT

SINGER MANUFACTURING COMPANY V. RAHN

132 U. S. 518 (1889)

This was an action brought by Rahn against the company to recover damages for a personal injury which the plaintiff sustained by reason of

the careless driving of a horse and wagon by one Corbett, who was alleged to be the servant of the defendant, and engaged in its business. The defendant denied that Corbett was its servant, but alleged that he was engaged in selling sewing machines of the defendant's manufacture on commission, and was an independent contractor. The defendant put in evidence the contract under which Corbett was at work, the terms of which sufficiently appear from the opinion.

GRAY, J. The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, a driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad v. Derby*, 14 How. (U. S.) 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done but how it shall be done." *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of a "selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company, and he "further agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not

only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract. that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The circuit court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. *Railroad Co. v. Hanning*, above cited; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Regina v. Turner*, 11 Cox Crim. Cas. 551.

Affirmed.

WHO MAY BE PRINCIPALS

ARMITAGE v. WIDOE

36 Mich., 134 (1877)

COOLEY, C. J. This action was brought to recover back \$400 paid in the plaintiff's name on a contract for the purchase of lands. The contract was entered into April 24, 1875, and purports to be between Jesse C. Widoe as vendor and Henry Armitage as vendee. The purchase price was \$13,000, of which \$3,000 was payable on or before May 10, 1875, and the balance in ten annual installments of \$1,000 each, with annual interest. Henry Armitage was about seventeen years of age at the date of the contract, and his name was signed to it by William H. Armitage, his father. The plaintiff by his own evidence, showed that he was ignorant of the contract at the time it was made, and never saw it until after this suit was brought; that he had no money to pay upon it and did pay none; and that his father told him what had been paid on the contract was to be recovered back in his, the son's name. The father was sworn as a witness, and testified that he made the contract and paid the money for his son, and that the son afterward, on being informed of it, assented to what had been done. There is some complaint of refusal or unwillingness on the part of the defendant to perform the contract on his part, and on the contrary he relies upon it as a valid contract, and offers to perform, but the suit appears to be grounded upon the right of an infant to disaffirm his contract and recover back what has been paid upon it.

I. Obviously the first question in the case is, how this infant who had nothing to do with the making of this contract in the first place,

has become entitled to any benefit under or because of it. If he has any right at all, it would seem that he must have acquired it in one of three ways; no other being conceivable. These are:

1. By virtue of the contract itself, made in his name, and which, though made without his knowledge, purported to assure to him rights which we may suppose were of value.

2. By the adoption of the act of his father in making the contract.

3. By accepting the contract as a gift from his father.

It is not claimed, as we understand it, that by the contract itself, independent of any action afterward taken, the infant would have had any rights at all. No contract is binding upon any party until he assents to it. Even a deed must be delivered and accepted; and much more must a contract be which contains onerous conditions, and assumes to bind the party to the payment of a large sum of money. Any suggestion, therefore, that the contract as made entitled the infant to any rights, may be dismissed from consideration. If when made it was a valid contract in favor of any one as vendee, it must have been in favor of the father, who, having made it in the name of another person without authority, might possibly have been compelled to perform it as his own contract, and been entitled to the benefit of it as his own. What rights there may have been by or against him, we need not consider as they are not involved, in this litigation.

II. If the contract became that of the infant through the adoption of the act of his father in making it, it must be because the infant has thus retrospectively made the father his agent. This, and this only, must be the force of the adoption; it is giving authority retrospectively, by claiming as his own that which without authority at the time was done in his name.

Had the infant in the first place undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities no rule is clearer than that an infant cannot empower an agent or attorney to act for him: *Whitney v. Dutch*, 14 Mass., 457, 460; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Fonda v. Van Horne*, 15 Wend. 631, 635; *Trueblood v. Trueblood*, 8 Ind. 195; *Cole v. Pennoyer*, 14 Ill., 158; *Knox v. Flack*, 22 Pa. St., 337; *Sadler v. Robinson*, 2 Stew. (Ala.), 520; *Robbins v. Mount*, 4 Robt., N. Y., 553. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize; *Doe v. Roberts*, 16 M. & W., 778, 781; *Fonda v. Van Horne*, 15 Wend. 631, 636; *Trueblood v. Trueblood*, *supra*. It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption.

Such a doctrine would deprive the infant wholly of his protection; for one has only to change the order of proceeding, assume to act for the infant first and get his authority afterward, and the principle of law which denies him the power to give the authority is subverted. But such a doctrine is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

III. Did the infant become entitled to the contract by the gift of his father? That he did, might perhaps be claimed with some degree of plausibility had the payment made on the contract been the whole or the principal part of the purchase price. But the payment was in fact insignificant when compared with what remained to be paid. If the infant took the contract, he took it with all its conditions, one of which was the payment of the sum of \$12,600 in the manner provided for therein. Now, there can be no presumption whatever that such a gift was for the benefit of the infant, and even if he were an adult, acceptance could not be presumed without some express evidence to establish it. In this case, instead of there being evidence that the infant accepts the contract, the suit itself assumes that he rejects it.

But treating the act of the father as a gift to his son, how does this entitle the son to demand and receive back the \$400 paid on the contract? This sum never belonged to the son, and there is no pretense that it was ever given to him. The gift was of a right under the contract acquired by means of the payment of the sum. This right is offered to the son, and according to the testimony of the father, he at first accepts it, but then turns around and says in effect: "No, I will not take this right, but I will demand and have what was paid for it." If he may do this, then what he obtained from his father was not the contract itself, but the right to repudiate the contract. But the right to repudiate a contract is not the subject of gift at all. Besides, the father never had it to give. If the contract was valid in his hands, he could not repudiate it, and he could not empower another to do what he could not do himself.

In what has thus far been said, we have not touched upon the authority of the infant to disaffirm a contract of purchase before coming of age. If the contract had become his in any way, it would be, we take it, only a voidable contract, and in *Dunton v. Brown*, 31 Mich., 182, the right to disaffirm a voidable contract during infancy was denied. But it is enough in this case to show that the infant never became entitled either to the contract or to the moneys paid under it.

The judgment must be affirmed, with costs.

WHO MAY BE AN AGENT

LYON V. KENT

45 Ala., 656 (1871)

Kent, Payne & Co., the plaintiffs, were residents of Richmond, Va., on January 17, 1865, and owned certain cotton which was in the custody of their agent in Alabama. On the above mentioned date they gave to James W. Singleton, a citizen of Illinois, an order on said agent for all the cotton belonging to them in his hands. Singleton sold the cotton to one Guy, who stored it with Lyon & Co., defendants herein. Plaintiffs bring this action of detinue for the cotton, alleging that the order given to Singleton was given simply to enable him to take possession of the cotton as agent of plaintiffs and save it from confiscation as contraband goods. Defendants claim that the transfer to Singleton was absolute. There was judgment for plaintiffs and defendants appealed.

PETERS, J. The only negotiation that Singleton had with the firm of Kent, Payne & Co., touching the cotton, took place in January, 1865, at Richmond, Virginia. If there was a sale at all, or any contract entered into between Singleton, a citizen of Illinois, and Kent, Payne & Co., citizens of Virginia, by which any title or interest in the cotton was attempted to be passed from the one to the other, it was wholly void and incapable of ratification. No trading between these parties was then allowable without a permit of the government. And the President's pass was not sufficient for that purpose: *McKee v. United States*, 8 Wall., 163, 166; *The Ouachita Cotton*, 6 Wall., 521, 531; *Brown v. Tarkington*, 3 Wall., 377, 381; *Kennett v. Chambers*, 14 How. 38, 50. Then, the order alone warned all who looked upon it, who knew the domicile of the parties to it, that it could not be evidence of a legal title. And it was not, unconnected with other proof, a power to sell or dispose of the cotton.

Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cotton had authorized him to take possession of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law or the policy of the government. They could change the agency of the custody of their cotton from one person to another. And they could make any person, capable of acting as an agent, such agent to take possession of their property for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war, ceased as soon as the war was ended; and its purpose being then legal, it might be legally

consummated. Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist, that "it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right in order to qualify himself or herself to act for others. Thus for example, monks, infants, *femes covert*, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others": *Story's Agency*, pars. 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer: *Powell v. The State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514. It was then, certainly not unlawful, or against the public policy of the nation for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium, facit, per se*: *Broom's Max.*, marg.; 1 *Pars. Con.*, 5th ed. p. 39, et seq.; *Story's Agency*, par. 440. And to this it may be added, that an agent dealing with the property of his principal, must confine his acts to the limit of his powers; otherwise, the principal will not be bound; 1 *Pars. Cont.* 41, 42, 5th ed.; *Powell v. Henry*, 27 Ala. 612; *Potts v. McCoy, et al.*, 20 Ala. 578; *Allen v. Ogden*, 1 W. C. C. 174. And it is also the duty of one dealing with an agent to know what his powers are and the extent of his authority; *Van Eppes v. Smith*, 21 Ala. 317; *Owings v. Hull*, 9 Pet. 608. Then, the agency to receive the delivery of the cotton from Browder, in compliance with the order, was not illegal. If it went beyond that it was void. And those who dealt with Singleton were bound to know this as they were bound to know the law.

The judgment of the Court below is affirmed.

A PRINCIPAL MAY RATIFY AN AGENT'S ACTS BY ACCEPTING THE BENEFITS OF SUCH ACTS

DEMSEY V. CHAMBERS

154 Mass. 330 (1891)

Tort, to recover for the breaking of a plate-glass window in plaintiff's building by the negligence of one McCulloch. Judgment for plaintiff.

Plaintiff ordered coal of defendant. McCulloch, without authority, delivered the coal in behalf of the defendant, and in so doing carelessly

broke the window. Defendant, with full knowledge of McCullock's act, presented a bill for the coal to plaintiff and demanded payment.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding, the court ruled, "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate, to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person," by a fiction, which is an echo of the *patria potestas* and of the English *frankpledge*. *Byington v. Simpson*, 134 Mass. 169, 170. *Fitz. Abr. Corone*, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381; *Fuller and Trimwell's case*, 2 Leon. 215, 216; *Sext. Dec. 5, 12*; *De Reg. Jur.*, Reg. 9; *D. 43, 26, 13*; *D. 43, 16, 1*, paragraph 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. *Y. B. 30 Ed. L. 128* (Rolls ed.); *38 Lib. Ass. 223*, pl. 9; *s. c. 38 Ed. 111. 18*, *Engettement de Garde*. See *Plowd. 8 ad fin., 27, 31*; *Bract. fol. 158 b, 159 a, 171 b*; *12 Ed. IV.*

9 pl. 23. But in these cases the defendants' assent was treated as relating back to the original act, and at an early date the doctrine of elation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV, 34, pl. 1. This decision is qualified in Fitz. Abr. Baylye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246; Hull v. Pickersgill, 1 Brod. & Bing. 282; Juskett v. Drummond, 10 B. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 188; Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moore, P. C. 22, 86; Cheetham v. Mayor of Manchester, L. R. 10 C. P. 249; Wiggins v. United States, 3 Ct. of Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done, can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command, so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers, and the earlier cases (D. 46, 3, 12, paragraph 4; D. 43, 16, 1, paragraph 14; Y. B. 30 Ed. 1, 128) has been changed to the dogma *aequiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig. Trespass, C. 1; Eastern Counties Railway v. Broom, 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine should be applied to the case of a bare personal tort. *Adams v. Freeman*, 9 Johns. 117, 118; *Anderson and Warberton, JJ.*, in *Bishop v. Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. *Wilson v. Barker*, 1 Nev. & Man. 409; s. c. 4 B. & Ad. 614, et seq.; *Smith v. Lozo*, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such a ratification as was necessary. *Tucker v. Jerris*, 75 Me. 184; *Hude v. Cooper*, 26 Vt. 552.

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established. *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, Cro. Eliz. 824; *Saunders v. Baker*, 2 Bl. 832; s.c. 3 Wils. 309; *Barker v. Braham*, 2 Bl. 866, 868; s.c. 3 Wils. 368; *Badkin v. Powell*, Cowper, 476, 479; *Wilson v. Tumman*, 6 Man. & G. 236, 242; *Lewis v. Read*, 13 M. & W. 834; *Buron v. Denman*, 2 Exch. 167, 188; *Bird v. Brown*, 4 Exch. 786, 799; *Eastern Counties Railway v. Broom*, 6 Exch. 314, 326, 327; *Rowe v. Birkenhead, Lancashire & Cheshire Junction Railway*, 7 Exch. 36, 41; *Ancona v. Marks*, 7 H. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225; *Exum v. Brister*, 35 Miss. 391; *Galveston, Harrisburg, & San Antonio Railway v. Donahoe*, 56 Texas, 162; *Murray v. Lovejoy*, 2 Cliff. 191, 195; see *Lovejoy v. Murray*, 3 Wall. 1, 9; Story on Agency, paragraphs 455, 456.

The question remains whether the ratification is established, as we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of the opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129; the ratification goes to the relation and established it ab initio. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's case*, Lane, 90, it was agreed that, if strangers as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser ab initio, although not privy to the misusing which made him so. And this proposition is stated as law in *Com. Dig. Trespass, C. 1*; *Elder v. Bemis*, 2 Met. 599, 605. In *Coomes v. Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant

would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

LEGAL EFFECTS OF RATIFICATION

GRANT V. BEARD

50 N. H. 129 (1870)

A father directs plaintiff to make repairs on two wagons which he said belonged to his sons. Later the sons ratified the act of the father and paid a part of the bill.

Among other things the jury were further instructed that, if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what had been done, their assent would not make them liable in this action unless they owned the wagons at the time they were repaired, or received some benefit from the repairs. To this last instruction the plaintiff excepted.

The plaintiff requested the following instruction: "If the jury find that the father procured the credit as the agent, either actual or assumed, of the defendants, and the credit was really given to them, then the subsequent ratification by the defendants will bind them, even though they may not have received the benefit of the credit."

The instruction was not given, and the plaintiff excepted. Verdict for the defendants.

Motion to set aside the verdict.

FOSTER, J. The ratification, upon full knowledge of all the circumstances of the case, of an act done by one who assumes to be an agent, is equivalent to a prior authority. By such ratification the party will be bound as fully, to all intents and purposes, as if he had originally given express authority or direction concerning the act.

A parol contract may be ratified by an express parol recognition of the act, or by conduct implying acquiescence, or by silence when the party, in good faith, ought to speak. And so the principal may be estopped to deny the agent's original authority. Story on Agency, § 239; Metcalf on Contracts, 112; Hatch v. Taylor, 10 N. H. 538; Despatch Line v. Bellamy Manf. Co., 12 H. H. 232; Davis v. School District, 44 N. H. 399; Warren v. Wentworth, 45 N. H. 564; Forsyth v. Day, 46 Me. 194; Ohio & Mississippi R. Co. v. Middleton, 20 Ill. 629.

Such ratification relates back to and incorporates the original contract or transaction, so that, as between the parties, their rights and interests are to be considered as arising at the time of the original act,

and not merely from the date of the ratification; and a suit to enforce the obligation assumed by the party who ratifies, is, to all intents and purposes, a suit founded upon the original act or contract, and not the act of ratification. *Davis v. School District*, before cited; *Low v. Railroad*, 46 N. H. 284; *Doggett v. Emerson*, 3 Story, 737; *Mason v. Crosby*, 1 Woodb. & M. 342; *Clark's Executors v. Vam Riemsdyk*, 9 Cr. 153; *Culver v. Ashley*, 19 Pick. 301; *Forsyth v. Day* before cited.

Therefore the original consideration applies to the ratification, thus made equivalent to an original contract, and supports the implied promise upon which the present action is founded.

The ratification operates directly, and not merely as presumptive evidence that the act was originally done by the authority of the defendants; and therefore it is unnecessary to consider whether or not the evidence tends to show an original authority. The subsequent assent is, per se, a confirmation of the agent's act; and there is no valid distinction between a ratification of the agent's act, and a direct and original promise to pay for the services rendered by the plaintiff. Wherever there would have been a consideration for the original engagement if no agent or party assuming to act as agent had intervened, such original consideration is sufficient to sustain the act of ratification.

In one of the cases cited is the subject of a new consideration, to support the ratification, alluded to as necessary; but the logical deduction from the principle that the ratification relates back to and covers the original agreement, is wholly inconsistent with such a proposition; and the contrary doctrine is expressly held in numerous cases. *Commercial Bank of Buffalo v. Warren*, 15 N. Y. Rep. 583, and cases cited.

There was abundant evidence, in the present case, from which the jury might have found that the defendants owned the wagons and received a positive benefit from the repairs; but such evidence and such finding were wholly unnecessary, because it is not material that the party making the promise should receive a benefit from the other party's act; it is sufficient if any trouble, prejudice, expense, or inconvenience accrued to the party to whom the promise is made. *Metcalf on Contracts* 163; 1 *Parsons on Contracts*, 431.

We are therefore of the opinion that the instruction of the court to the jury "that if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what had been done, their assent would not make them liable unless they owned the wagons at the time they were repaired, or received some benefit from the repairs," was erroneous; and for this reason the verdict must be set aside, and a

New trial granted.

A PRINCIPAL CAN NOT RATIFY A TRANSACTION IN PART
AND REPUDIATE IT IN PART, HE MUST RATIFY OR
REPUDIATE THE CONTRACT IN ITS ENTIRETY

EBERTS V. SELOVER

44 Mich. 519 (1880)

Assumpsit to recover ten dollars as subscription price of a book. Defendant tenders \$4.27. Judgment for defendant. Plaintiffs bring error.

COOLEY, J. This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence, it appears that when Schenck, the agent, solicited his subscription, the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to the time of delivery of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving at the same time from the agent the following paper:—

Coldwater, April 29, 1878.

Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

EBERTS & ABBOT, per SCHENCK.

The plaintiffs claim that the history was duly delivered, and they demand the subscription price, repudiating the undertaking of the agent to receive anything else, as being in excess of his authority, and void. The defendant relies on that undertaking, and has brought into court \$4.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

It may be perfectly true, as the plaintiffs insist, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendants' liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson v. Breen*, Walk. Ch. 56; *Dudgeon v. Haggart*, 17 Mich. 273. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that the plaintiffs should accept his justice's fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part.

When plaintiffs discovered what their agent had done, two courses were open to them; to ratify his contract, or to repudiate it. If they ratified it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them, and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.

The judgment must be affirmed with costs.

WHERE A PRINCIPAL HOLDS AN AGENT OUT AS HAVING
GENERAL POWERS, THIRD PERSONS ARE NOT BOUND
BY ANY SECRET LIMITATIONS ON THE AGENT'S
AUTHORITY

BRECKENRIDGE v. LEWIS

84 Me. 349 (1892)

Assumpsit by Joseph Breckenridge against Mary A. H. Lewis. There was a verdict for plaintiff, and defendant moves to set the same aside, and excepts.

HASKELL, J. The plaintiff indorsed the defendant's promissory note for the accommodation of one Morse, the payee, who then nego-

tiated the same, and, when it fell due, the plaintiff paid it, and now sues to recover the amount of the note from the defendant.

1. The signature of defendant to the note was claimed to be a forgery. The court ruled that a defense.

2. The note was claimed to have been fraudulently written by the payee, Morse, over the defendant's name, signed on blank paper, to enable Morse to write an order on a savings bank, where defendant had funds, as the necessities of her business entrusted to Morse might require; and the court ruled that contention no defense.

It is contended that defendant's negligence in the premises should have been submitted to the jury; but that was not necessary, inasmuch as the question of negligence, as matter of fact, need not be considered an element required to charge the defendant under the facts of this case. The payee of the note, Morse, was intrusted with defendant's name in blank, to draw funds necessary to meet the calls of her business, intrusted to the care of her agent, Morse. He was authorized to write an order above defendant's signature, but instead of so doing he wrote a promissory note and obtained the amount of it from a stranger. He fraudulently used his apparent authority for his own gain instead of his principal's. His relation to his principal is the same as if he had procured the money on an order that he was authorized to write, and then embezzled it. The defendant may be held under the plain rules of agency. By intrusting her signature to her agent for use, the defendant gave him an apparent authority to use it in the manner he did. The limited authority, only known to themselves, cannot be held to reach to strangers, who neither knew, nor had means of knowing, of the secret limitation. The note, when presented for discount, gave no suggestion of infirmity. The signature was genuine, and apparently the payee, defendant's agent, who indorsed it, had authority to negotiate it. It was apparently the defendant's genuine promise, and she, by intrusting her name to her agent for commercial purposes, held him out as an agent, with general powers in relation to it. She clothed him with apparent authority, and cannot now deny it to the loss of any person who innocently relied upon it. It is better that she bear the consequences of misplaced confidence than that an equally innocent person shall suffer. She selected the agent; the plaintiff did not. The apparent authority of the agent makes his act her own, in this case, as effectually as if her authority had been real. That is the doctrine of *Young v. Grote*, 4 Bing. 253, and of *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, cited with approval in *Wade v. Withington*, 1 Allen 562, and in *Greenfield Bank v. Stowell*, 123 Mass. 198, 199, 25 Am. Rep. 67, where all the cases, both English and American, are reviewed. See, also, *Redlon v. Churchill*, 73 Me. 146, 40 Am. Rep. 345. . . .

It is the same doctrine held where the signature is placed to a blank instrument to be filled by the person intrusted with it, only the blank is a patent limitation of the agent's authority. He may fill the blank as may suit him best, and the principal will be held. The blank form carries with it an implied authority to complete it, but not to alter it. *Russell v. Langstoffs*, 2 Doug. 514; *Violett v. Patton*, 5 Cush. 142; *Bank v. Neal*, 22 How. 96; *Bank v. Kimball*, 10 Cush. 373; *Angle v. Insurance Co.*, 92 U. S. 330; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427, approved in *Kellogg v. Curtis*, 65 Me. 61.

Motion and exceptions overruled.

AN AGENT CAN NOT COLLECT COMMISSION FROM BOTH BUYER AND SELLER

RICE v. WOOD

113 Mass. 133 (1873)

Action in contract to recover commissions as a broker. Defendant requested the court to charge that a broker acting for both parties cannot recover commissions from either, unless both knew of and assented to his double agency. The court, however, charged that he could recover from the party who had knowledge of it. Plaintiff recovered and defendant alleged exceptions.

DEVENS, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who had promised to pay them a commission therefor, to dispose of certain real estate, and that afterward, without the knowledge of such person, an agreement was made between the plaintiffs and the defendant, by which the plaintiffs were employed to act for the defendant in the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant knowing at the time that the plaintiffs were employed for a commission to sell such real estate; and further, that afterward the plaintiffs introduced the defendant to the owner of such real estate; and by the instrumentality of the plaintiffs the exchange of defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, would be exclusive against the claim, upon the ground that the plaintiffs, if such facts should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a posi-

tion antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party. It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. *Walker v. Osgood*, 98 Mass. 348. Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. *Fuller v. Dame*, 18 Pick. (Mass.) 472. We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaintiffs were middle-men only, bringing the parties together and doing nothing further, the parties themselves making the contract. In *Rupp v. Sampson*, 16 Gray (Mass.) 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely, the introduction of the other

party to him, the parties after such introduction making their own contract. It was there held that this was not such a fraud upon the other party, who also paid for the services of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant void for illegality. That, however, is not the present case.

It here appears, by the bill of exceptions, not only that there was evidence that the plaintiffs introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers and not middle-men only.

Exceptions sustained.

AN AGENT MUST EXERCISE GOOD FAITH

BUNKER V. MILES

30 Me. 431 (1849)

Assumpsit for money had and received. Judgment for plaintiff.

Defendant bought a horse of one Seaver for \$65, and agreed that if the horse sold for more than \$65, he would divide that profit with Seaver. Defendant then had \$80 of plaintiff's money with which to buy that horse, and was to buy it as cheaply as possible and receive one dollar for his services. Defendant told Seaver he had sold the horse for \$80, and gave Seaver \$7.50, keeping \$7.50 for himself. Judgment for \$6.50 and interest.

TENNEY, J. The case was put to the jury upon evidence introduced by the plaintiff alone. It appeared that he placed in the hands of the defendant the sum of \$80, and requested him to obtain a certain horse. The defendant was restricted, in the price to be paid, to that sum, and was to procure the horse at a less price, if he should be able to do so, it being agreed that the defendant should receive the sum of \$1.00 for his services in purchasing the horse. He obtained the horse and delivered him to the plaintiff, who received him and disposed of him the same day. The defendant represented to the plaintiff, that he had saved nothing for himself. It appears by other testimony that the price paid for the horse by the defendant did not exceed the sum of \$72.50.

If the defendant made a valid contract with the plaintiff, to do the service requested as an agent, and did do it as was agreed, he was not at liberty to make a profit to himself in the transaction, in which he was

acting as the agent; and whatever sum remained in his hands, after paying the price of the horse, deducting the compensation to be made to him, was the money of the plaintiff, for which the equitable action of money had and received could be maintained. The instructions to the jury were consistent with these principles, and a verdict was rendered for the plaintiff.

Exceptions overruled.

AN AGENT IS NOT DIRECTLY LIABLE ON AN INSTRUMENT HE EXECUTES WITHOUT AUTHORITY IN ANOTHER'S NAME

PATTERSON V. LIPPINCOTT

See Contracts, page 67.

AN AGENT WHO HAS THE PROCEEDS OF AN ILLEGAL SALE BELONGING TO HIS PRINCIPAL MUST PAY IT OVER

BALDWIN BROTHERS V. POTTER

46 Vt. 402 (1874)

Assumpsit. Judgment for plaintiffs. Defendant appeals.

Defendant, as plaintiffs' agent, sold prize packages of candies and collected the price. Defendant refused to account for the moneys or for samples of the prizes intrusted to him, and defended upon the ground of the illegality of the transaction.

PIERPONT, C. J. We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce them. If those contracts were illegal, the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid it became the plaintiff's money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise, on the part of the defendant, to pay it over

to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce: no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiffs could not have enforced the contracts of sale as between themselves and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money, that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case. *Tenant v. Elliott*, 1 B. & P. 3; *Armstrong v. Toler*, 11 Wheat. 258; *Evans v. City of Trenton*, 4 Zab. (N. J.) 764.

We think the certificate granted by the county court was properly granted. It has been urged in behalf of the defendant, that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.

AUTHORITY OF AGENT TO EXECUTE MORTGAGE

GARDNER V. GARDNER

5 *Cushing* 483 (1850)

Action to foreclose a mortgage. It appeared that the name of Polly Gwinn, the mortgagor, was written by her consent, in her presence, by her daughter.

SHAW, C. J. The only question is upon the sufficiency of the execution of a mortgage deed, as a good and valid deed of Polly Gwinn. The execution of the deed is objected to, on the ground that when a deed is executed by an agent or attorney, the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind which are the essential and efficient ingredients of the deed, are hers, and she merely used the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written

sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his acts, and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself. To hold otherwise, would be to decide, that a person having a clear mind and full capacity, but through physical inability incapable of making a mark could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing the letter of attorney under seal.

It appears to us, that the distinction between writing one's name in his presence and at his request, and executing a deed by attorney, is obvious, well founded, stands on satisfactory reasons, and is well sustained by authorities; *Ball v. Dunsterville*, 4 T. R. 313; *The King v. Longnor*, 1 Nev. and M. 576, s. c. 4 Barnard Adol. 647; 2 Greenl. sec. 295. We think the deed was well executed by Polly Gwinn; and the judgment must therefore stand for the demandant.

DISTINCTION BETWEEN A GENERAL AND A SPECIAL AGENT

BUTLER V. MAPLES

9 Wallace (U. S.) 766 (1869)

Butler and others, during the late rebellion, were copartners doing business under the firm name of Bridge & Co., at Memphis, Tenn. One Shepherd professed to act as their agent. He had been authorized, by written agreement in 1863, to purchase cotton for them in Desha county, Arkansas, and its vicinity. He was to buy on the best possible terms, paying not more than 30 cents per pound on the average, and it was agreed that he should pay as little as possible on the cotton until it should be delivered on a boat or within the protection of a gunboat. There was also the testimony of one Martin that he had been sent to Arkansas by defendants, Bridge & Co., with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to pay more than from 30 to 35 cents per pound. He might make small advances, but was instructed not to pay the balance of the purchase money, or make it payable, until the firm should be able to send a boat up the Arkansas river for the cotton, and until it was in their possession, weighed and placed on the boat. He was directed to take no risk for the firm of the destruction of the cotton except to the extent of the money advanced.

While so professing to act as the agent of Bridge & Co., Shepherd purchased 144 bales of cotton from Maples, buying it as it lay, and agreeing to pay 40 cents a pound for it as soon as weighed. Having been weighed, he removed 54 bales of it, but 90 bales were burned before they could be placed on a boat to be carried up the river. The 54 bales went through to Memphis, and Maples went there to see Bridge & Co. He saw one of the firm, who wholly denied Shepherd's authority, refused to pay anything for the cotton lost, believing what was told him as to Shepherd's authority. Having learned more regarding this matter, he sued Bridge & Co. for the price of the cotton burned. Verdict for the plaintiff, and defendants removed the case to the Supreme Court.

STRONG, J. At the trial, it was, of course, incumbent upon the plaintiff to prove not only the contract of sale, but also that Shepherd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly, evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants, and bind them to its performance was stoutly denied, and it is now strenuously insisted that the court erred in the instructions given to the jury respecting the evidence of his agency. The defendants insist the the court erred in charging that the written agreement between him and Bridge & Co. constituted him their general agent. We do not find that the court did thus instruct the jury though it must be admitted the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaintiff. It is true, as has been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent.

But did it not? The distinction between a general and a special agency, is in most cases a plain one. The purpose of the latter is a single transaction or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than

one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents, one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise.

Looking to the agreement between Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority, to buy cotton in Desha county and its vicinity, to buy, generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions, which were in the minds of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were communicated. It was, therefore, not error to instruct the jury as the court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here, that the reasons urged by the plaintiffs in error, in support of their denial of liability for the engagements made by Shepherd, are, that he agreed to pay forty cents per pound for the plaintiff's cotton, that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase.

The agreement is that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his

obtaining a permit from the government. All this however is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him were bound to inquire. But even as between Bridge & Co. and Shepherd a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an average of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once where it lay, though not on a boat or in the protection of a gun-boat. He was authorized to purchase deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of gun-boat; and when thus delivered, the property in the goods was to vest in the principals, excepting his share of the profits, but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He might have been, had it been necessary, but if under the permit granted by Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respecting general and special agency, that it was not applicable to the proof in the case, and was therefore irrelevant and calculated to mislead the jury, and, because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct, and it was applicable to the evidence in the case. It has been intimated during the argument that the court should have added that no such liability can exist to one dealing with an agent with notice that the partic-

ular act of the agent was without authority from the principal. To this several answers may be made. The exception to the general rule which it is said the court below should have recognized, is implied in what the court did say. Again, there was no request for any such instruction, and still again the evidence in the case did not demand it.

There was no pretense that the plaintiff had any notice of secret instructions given to Shepherd, or any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far-fetched that infers a duty to inquire whether the agent had private instructions from the fact that the contract was made in a region that had been in a state of insurrection. . . .

Judgment affirmed.

AUTHORITY OF AN AGENT TO BIND AN INFANT

TRUEBLOOD V. TRUEBLOOD

8 Ind. 195 (1856)

PERKINS, J. Bill in chancery under the old practice to compel a specific performance, and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845 William Trueblood was an infant, and owner of a piece of land. At that date Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single, simply the bond of Richard, and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond and afterwards sold and conveyed the land to another, Robert Lockridge, who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of

ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done. As we have seen, the bond is not in terms the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his consent to them, he cannot be a party to a suit upon the articles; *Brock v. Parker*, 5 Ind. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified; *State v. State Bank*. 5 Ind. 353; if the latter, it can be; *Reeve's Com. Rel.* 240.

In the first volume of *American Leading Cases* (3d ed.), 248, et seq., the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In *Doe v. Roberts*, 16 Mee & W. 778, a case slightly like the present in some respects, the attorney in argument said: "Here a tenancy has been created, either by the children, or by Hugh Thomas acting as their agent."

PARKE B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See *Hiestand v. Kuns*. 8 Blackf. 345.

The decree below must therefore be affirmed with costs.

REPRESENTATIONS OF AGENT

KROEGER V. PITCAIRN

101 Penn. 311 (1882)

Pitcairn was a fire insurance agent and had written a policy for Kroeger. Kroeger kept petroleum on his premises which was forbidden by the terms of the policy, unless written consent was indorsed thereon. Kroeger called Pitcairn's attention to this clause and was assured by the latter that no written indorsement was required where the amount kept was so small as that which Kroeger carried in stock. Kroeger therefore accepted the policy without the indorsement. A fire destroyed his stock and in an action against the insurance company, Kroeger was defeated because he had kept this petroleum without the written consent. He brought this action against Pitcairn to recover damages for the misrepresentation. Judgment for defendant below.

STERRETT, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant non obstante veredicto.* It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several matters specified in plaintiff's point, and hence it must be now regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise mentioned in the policy should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant acting as its agent and assuming authority to speak for the insurance company, asserted without any qualifications that when carbon oil was kept as plaintiff was in the habit of keeping it—a single barrel at a time—it was unnecessary to mention the fact in the policy, or otherwise obtain the

* Notwithstanding the verdict.

consent of the company; that no notice is ever taken of it unless "it is kept in large quantity—say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium; and to that end at least it was successful. What was said and done by defendant, in the course of a transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed a part of the insured stock of merchandise, without being specially mentioned in the policy.

The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or anyone duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not.

The only difference is that in the latter the authority is self-assumed, while in the former it is actual, but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, "whenever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for, or on account of his principal." Story on Agency, 264. The same principle is recognized in Evans on Agency, 301; Whart. on Agency, 524; 2 Smith's Lead. Cases, 380, note; 1 Pars. Cont. 67, and in numerous adjudicated cases, among which are Hampton v. Speck-

enagel, 8 S. & R. 212, 222; 11 Am. Dec. 704; Layng v. Stewart, 1 W. & S. 222, 226; McConn v. Lady, 10 W. N. C. 493; Jefts v. York, 10 Cush. 392; Baltzen v. Nicolay, 53 N. Y. 467.

In the latter case, it is said, the reason why an agent is liable in damages to the person with whom he contracts when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In Layng v. Stewart, *supra*, Mr. Justice Huston says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person his principal is not bound, and in such case the agent is bound."

The plaintiff in error, in McConn v. Lady, *supra*, made a contract believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this court in affirming the judgment said: "It was a question of fact submitted to the jury whether the plaintiff in error had authority from the school board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: 1, Where the agent makes a false representation of his authority with intent to deceive. 2, Where, with the knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and 3, Where he undertakes to act bona fide, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent, and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable.

In Story on Agency, the learned author, recognizing the undoubted liability of those belonging to the first two classes, says: "Another case may be put which may seem to admit of some doubt, and that is where

the party undertakes to act as an agent for the principal, bona fide, believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally responsible, as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice, for every person so acting for another, by a natural if not a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts bona fide, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it." Story on Agency, 264. This principle is sustained by the authorities there cited, among which is *Smout v. Ilbery*, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of the opinion that upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law.

Judgment reversed, and judgment is now entered in favor of the plaintiff for \$3,027.20, the amount found by the jury, with interest from January 20, 1882, the date of the verdict.

Judgment reversed.

SIGNATURE OF AGENT

DEAKIN V. UNDERWOOD

37 Minn. 98 (1887)

Action for specific performance.

MITCHELL. J. This was an action to compel specific performance of a contract for the sale of real estate. Plaintiff alleges that the defendant made the contract "by A. B. Wilgus, his duly authorized agent and attorney in fact." The contract is attached as an exhibit to the complaint, and is signed, "O. W. Underwood, by A. B. Wilgus, Agent."

1. It appears from the evidence that the authority to sell was given to the firm of A. B. Wilgus & Brother, a partnership composed of A. B. Wilgus and E. P. Wilgus. It is claimed that, upon this state of facts, there was a failure of proof. But the material allegation of the complaint was that defendant had made this contract for plaintiff. It was not necessary to allege that it was made through an agent. It would have

been enough to declare upon it generally as of the personal act of the principal. The substance of the issue was not whether defendant had made the contract through an agent, but whether he had made it at all. Hence it cannot be said that there was a failure of proof. The most that can be possible claimed is, that there was a variance between the allegation and proof, but which could not, in this case, have misled the defendant to his prejudice, and therefore is not material.

2. Defendant further contends that the authority to sell being to the firm of A. B. Wilgus & Brother, which was composed of two members, this authority could only be executed by the two jointly, and not by one separately, so as to bind the principal. In support of this contention, he invokes the well-known general rule of the common law, that where authority to do an act is conferred upon two or more agents, the act is valid to bind the principal only when all of them concur in doing it; the power being joint and not several. *Rollins v. Phelps*, 5 Minn. 463. Even where the authority is given to several agents, this rule is not so rigid and inflexible as to overcome the apparent intention of the parties to the contrary. *Story on Agency*, Par. 42, 43; *Hawley v. Keeler*, 53 N. Y. 114. But we think the rule has no application where the authority is given to a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the partnership as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power. *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71.

But it is claimed that, conceding this he must do it in the name of the firm, and that if, as in the present case, he uses his individual name, it is not the act of the partnership, and will not bind it. The defendant seems to overlook the fact that the contract is the act of the principal, and not of the agent, and that the party to be bound is the former, and not the latter. Hence the important question is, whether the principal's name has been signed to the contract by one having authority to do so. That in this case A. B. Wilgus, as a member of the firm of A. B. Wilgus & Brother, had, by virtue of the authority given the firm, power to execute this contract in the name of the defendant, cannot be questioned, and it is wholly immaterial whether to that name he added "by A. B. Wilgus & Brother," or "A. B. Wilgus," or nothing at all. An agent, authorized to sign the name of his principal, effectually binds him by simply fixing to the instrument the name of his principal, as if it were his personal act. The particular form of the execution is not material, if it be done in the name of the principal, and by one having authority

in fact to execute the instrument: *Berkey v. Judd*, 22 Minn. 287, 302; *First National Bank v. Loyhed*, 28 Id. 396; *Devinney v. Reynolds*, 1 Watts & S. (Penn.) 328; *Forsyth v. Day*, 41 Me. 382.

3. The authority to the firm was to sell for one-half cash, and the other half payable on or before one year. They sold for one-half cash and the other half payable in one year. It is claimed that this was unauthorized, and therefore the principal is not bound. The terms of the contract as executed, so far as they affect the rights of the defendant, were in legal effect the same as those authorized. By each he would be entitled to demand payment in one year, and not before. The distinction between this case and one where the facts are exactly reversed (such as *Jackson v. Badger*, 35 Minn. 52) will be apparent on a moments reflection. . . .

We therefore think that the evidence shows a binding contract by the defendant to sell and convey, and shows no valid reason why he ought not to and cannot perform.

Order reversed.

LIABILITY FOR TORTS OF SERVANT

COHEN V. DRY DOCK COMPANY

69 N. Y. 170 (1887)

Appeal from order of the General Terms of the Superior Court of the city of New York, reversing a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on the trial, and granting a new trial. (Reported below, 8 J. & S., 368.)

This action was brought to recover damages alleged to have been sustained by reason of the negligence of defendant's servant. On April 27, 1872, plaintiff was driving along Catharine Street, in the city of New York, in a buggy. He had crossed the track of defendant's road, but before the rear part of the buggy was far enough from the track, so that a car could pass without striking it, his further progress was arrested by a blockade of trucks and other vehicles, and he was unable to move forward, and by other vehicles he was prevented from moving in any direction. A car approached on defendant's road, the driver of which, as plaintiff testified, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the truck moved, promising then to move. The driver said, "Damn you, if you don't get off here—I am late—I will get you off some other way." The plaintiff said, "You wait a moment; I guess the trucks are moving, and I may go." The trucks started, and as the plaintiff prepared to move on, the driver started his horses, and the platform of the car struck the

hind wheels of the buggy and overturned it, thus causing the injury complained of.

Defendant's counsel moved for a nonsuit on the ground, among others that the car-driver's act was not within the scope of his authority, but was an unlawful and unauthorized act, for which defendant was not responsible.

PER CURIAM. The general rule of law contended for by the appellant, that a master cannot be held liable for the willful, intentional, and malicious act of his servant, whereby injury is caused to a third person, is not disputed. Many limitations and illustrations of the rule will be found in reported cases, and it is not always easy to apply the rule. It has recently been under consideration in this court in the case of *Rounds v. The Delaware, Lack. & Western R. R. Co.*, 64 N. Y. 129, and in the opinion of Andrews, J., in that case, is found a very thorough and satisfactory consideration of the rule, and the principles upon which it is founded. The general principles there announced are as follows: To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the willful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant uses more force than is necessary, the master is liable.

The master who puts the servant in a place of trust or responsibility or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

The master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. But if the servant, under guise and cover of executing his master's orders, and executing the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury, then the master is not liable.

When it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders.

The application of these principles to the facts of this case leaves no doubt that the case was properly disposed of by the General Term of the Superior Court. The driver was driving this car for the defendant, and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles on the track in the way of his car; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and the purposes of the driver, and of the character and quality of his acts.

The order must be affirmed and judgment absolute ordered against the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

AUTHORITY OF AN AGENT IS REVOKED BY THE DEATH OF THE PRINCIPAL

LONG V. THAYER

150 U. S. 520 (1893)

Bill in equity filed by Thayer to enjoin enforcement of a judgment of ejectment obtained by Long against one Smith, a tenant under Thayer. Judgment for Thayer, upon condition that he pay into court \$126.25, with interest, and decree that Long deposit quit claim deed, etc. Long appeals.

Thayer bought the lot in question of Skiles and Western under a contract made with their agent Kinney, by which upon non-payment of future instalments (amounting to \$252.50), Thayer was to forfeit the

contract. Western died soon after. The instalments were paid by Thayer to Kinney after Western's death, one being paid before he knew of Western's death, and one after he knew of it. Long is the grantee from Western's heirs, who had by partition proceedings succeeded to Skiles' interest also.

MR. JUSTICE BROWN (after stating the case) delivered the opinion of the court.

This case turns largely upon the legal effect to be given to the death of Western, which took place a few days after the contract for the sale of the land was made, and before the first note became due. Had Western not died, there can be no question that the payments to Kinney would have been good, and that Thayer would have been entitled to a deed.

Western's death undoubtedly operated as a revocation of Kinney's authority to act for him or his estate. The payments made to Kinney as his agent would not be sufficient to discharge Thayer's obligation to his estate, even if such payments were made by him in actual ignorance of Western's death. *Michigan Insurance Co. v. Leavenworth*, 30 Vermont, 11; *Davis v. Windsor Savings Bank*, 46 Vermont, 728; *Jenkins v. Atkins*, 1 Humphrey (Tenn.), 294; *Clayton v. Merrett*, 52 Mississippi, 353; *Lewis v. Kerr*, 17 Iowa, 73. Indeed it was said by this court in *Galt v. Galloway*, 4 Pet. 332, 344, that "no principle is better settled, than that the powers of an agent cease on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void."

Whether Western's death also operated as a revocation of the verbal authority given by Skiles may admit of some doubt, although the weight of authority is that the death of one partner or joint owner operates, in the case of a partnership, to dissolve the partnership, and in the case of a joint tenancy to sever the joint interest and the authority; of an agent appointed by a firm or joint owners thereupon ceases, where such authority is not coupled with an interest. *McNaughton v. Moore*, 1 Haywood (N. C.), 189; *Rowe v. Rand*, 111 Indiana, 206.

But even if it did operate as a technical revocation of Kinney's authority to act for Skiles, the presumption is, from Skiles' long silence, in the absence of proof to the contrary, that Kinney accounted to him for his proportion of the money collected. The court below evidently proceeded upon this theory, and required Thayer, as a condition for calling upon Long for a deed, to repay one-half of the amount of the two notes with the stipulated interest at 10 per cent. These were certainly as favorable terms as Long could expect. Thayer had paid the money to Kinney, with whom the contract was made,—the first payment in

actual ignorance of Western's death, and the second doubtless under the supposition, which a person unlearned in the law might reasonably entertain, that payment to the person with whom the contract was made was sufficient, and that Kinney would account to the proper representatives of Western, and procure him a deed. All the equities of the case were in Thayer's favor, and justice demanded that Long should be required to convey, upon being paid, Western's share of the consideration with interest.

There is another view of the case which does not seem to have been presented to the court below, and which indicates that Long received even more than he was really entitled to. The second note of \$150, which is produced, appears upon its face to have been payable to "J. F. Kinney or bearer," and while the first note if not produced Kinney swears that this was also payable in the same manner. The probabilities are that it was, both from the fact that the second note was payable to bearer and from the further fact that Kinney claimed that Western was largely indebted to him. If such were the case (and Kinney's authority to take these notes is not disputed), it is difficult to see why the payments to Kinney, who himself held the notes, were not valid payments, which entitled Thayer to a deed to the land. So long as these notes were outstanding, he could not safely pay to anyone else, and if he paid the holder, he did just what the contract required him to do.

Long clearly was not an innocent purchaser of the land in question. Not only had Thayer been in the open, notorious, and unequivocal possession of the land and its improvement, renting the premises and paying the taxes, but Long's marriage into the Western family, his taking a deed from the heirs through Mr. Meriwether, the husband of one of the heirs, who acted as attorney both for Long and for the heirs, and the giving of a promissory note unsecured by mortgage upon the land,—a note which the heirs apparently never saw,—indicate very clearly that he could not have been ignorant of the true situation.

The decree of the court below was clearly right, and must be affirmed.

NOTICE OF REVOCATION OF AN AGENCY

CLAFLIN v. LENHEIM

66 N. Y. 301, (1876)

Action to recover for merchandise alleged to have been sold by plaintiff to defendant. The opinion states the facts. Judgment for defendant and plaintiffs appealed.

RAPALLO, J. The plaintiff's seek to recover in this action the price of certain merchandise which they allege that they sold and delivered to the defendant, through his brother H. S. Lenheim, as his agent.

To establish the agency, they proved that this brother of the defendant had, for several years prior to July, 1867, conducted the business of a store at Meadville, Pennsylvania, in the name of the defendant, and had been in the habit of purchasing goods for that store from the plaintiff's. These purchases were all made in the name and on the credit of the defendant, and the bills thereof were rendered to and paid by him.

The defendant conceded, in his testimony, that previous to a fire which took place in July, 1867, in the store at Meadville, his brother was authorized by him to make purchases and carry on that store in his, the defendant's name, but contends that after the fire he terminated such authority. The purchases for which this action was brought were made by the brother, for the Meadville store, in November and December, 1869, in the name of the defendant. The plaintiffs claim that they had no notice of the revocation of the agency, and sold on the credit of the defendant.

The last bill paid by the defendant for goods sold for the Meadville store, was for upwards of \$8,000, and was paid in August, 1867. It was for goods sold before the fire. There was a difficulty between the plaintiffs and the defendant about this bill. An action was brought upon it and an attachment issued against the property of the defendant, and he was required to pay the costs of these proceedings, which he did in August, 1867. The defendant had for several years previously carried on another store at Great Bend, Pennsylvania, and had been in the habit of purchasing goods from the plaintiffs for that store; but after this difficulty he suspended all his dealings with the plaintiffs until the month of October, 1869, when he resumed his business relations with them by the purchase of goods, personally, for the store at Great Bend. In the following months of November and December, 1869, the brother made the purchases now in controversy, in the name of the defendant, for the Meadville store.

The defendants gave evidence on the trial tending to show actual notice to the plaintiffs of the revocation of the agency, after the fire of July, 1867. It was conceded that the plaintiffs had notice of the burning of the store in Meadville, but the evidence of the notice of the revocation of the agency was controverted.

The court submitted to the jury the question whether the plaintiffs had notice of the revocation, but charged that if the jury came to the conclusion "that the circumstances of the case were such, independently of the question of notice, that in fair dealing between man and man,

plaintiffs should have inquired by telegraph or by letter of the defendant at Great Bend whether he continued the Meadville store, and whether the brother continued to have authority to buy goods in his name, that will end the recovery in this case;" and, further, that if the jury came to the conclusion "that no notice in fact was given and that the circumstances were such as to put the plaintiff fairly upon inquiry as to whether that business was continued by the defendant and the brother had authority to continue it by making these purchases, that ends the responsibility on the part of the defendant." Exceptions were duly taken to the portions of the charge above quoted.

It is a familiar principle of law that when one had constituted and accredited another his agent to carry on his business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given; and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rule as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred as a fact, from circumstances, the question is for the jury; they must determine, as a question of fact, whether the party claiming against the partnership or the principal, did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court, in the present case, properly submitted to the jury this question of fact.

But the court submitted to the jury the further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent continued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

Assuming that the doctrine of constructive notice is applicable to cases of this description, what circumstances amount to constructive notice is a question of law. Where the facts are in dispute, a mixed question of law and fact is presented, and then of course the question is to be determined by the jury, under instructions by the court, as to the effect of the circumstances which they may find to have existed.

But the question whether circumstances which are undisputed, or are found by the jury, are sufficient to put a party on inquiry and thus charge him with constructive notice, is not for the jury, but for the court.

In this case, throwing out of view the evidence bearing upon the question of actual notice, there was no controversy about the fact. These were, that the store at Meadville was burnt in July, 1867, and the plaintiffs knew of the fire; and that the plaintiffs brought an action and issued an attachment against the defendant for the bill then due for goods furnished to the store at Meadville; that this claim and the cost of the proceedings were paid by the defendant in August, 1867, and the defendant thereafter suspended all dealings with the plaintiffs until October, 1869, when he resumed them, and that in November, 1869, the brother resumed his purchases for the Meadville store, from the plaintiffs, on credit as the agent for the defendant. Whether these circumstances were sufficient to put the plaintiffs on inquiry, or, in other words, whether they amounted to constructive notice of the fact, which an inquiry would have disclosed, viz., the revocation of the agency, was a question of law, to be determined by the court, and it was error to submit it to the jury. *Am. Linen Thread Co. v. Wortendyke*, 24 N. Y. 550; *Howe v. Thayer*, 17 Pick. (Mass.) 91.

Constructive notice is a legal inference from established facts, and when the facts are not controverted, the question is one for the courts. Whether, under a conceded state of facts, the law will impute notice, is not a question for the jury. *Birdsall v. Russell*, 29 N. Y. 220. 249.

This error, however, would not be ground for reversing the judgment if it appeared that the court would have been justified in holding, as matter of law, that the circumstances were sufficient to put the plaintiffs on inquiry, and we must, therefore, examine that question.

The mere fact that the store at Meadville was burnt did not indicate that the defendant intended to discontinue business there; and if business had been promptly resumed and purchases for the store renewed by the defendant's brother, there could have been no reason, in the absence of any notice from the defendant, to suppose that the agency had been discontinued. The principal feature in the case is the delay of two years and upward between the fire and the resumption of purchases, by the defendant's brother, for the Meadville store. But, under the circumstances, this delay might well have been attributed by the plaintiffs to the difficulty between them and the defendant, in July and August, 1867, which resulted in the defendant suspending all dealings with the plaintiffs, notwithstanding that he continued his business at Great Bend. And when the defendant, in 1869, resumed his dealings with the plaintiffs, without giving them notice of any change in his

business arrangements with his brother, at Meadville, the plaintiffs were warranted in believing that the suspension of the dealings of the brother were attributable to the same cause which had deterred the defendant himself from making purchases; and when, immediately after the defendant himself resumed dealings, the brother applied to make purchases as before, for the Meadville store, the plaintiffs would not, naturally, attribute the suspension of dealings for that store, in the meantime, to a revocation of the agency, not suspect that the brother was committing a fraud. We must, in considering the portion of the charge excepted to, assume, as we have assumed, that no notice was given by the defendant to the plaintiffs that he had discontinued his business at Meadville or revoked the authority of his brother, and that the plaintiffs knew nothing of it, for the charge expressly submits the question of constructive notice, independently of the question of notice in fact, and expressly states that the jury are to pass upon it in case they find that there was no notice in fact.

We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact. In this there is no hardship upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiff had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution.

The jury may have been satisfied that notice was given, but under the charge they may have rendered their verdict solely on the ground of constructive notice; the judgment must, therefore, be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

PARTNERSHIP

WHAT IS A PARTNERSHIP?

THE QUEEN V. ROBSON

Crown Case reserved (1885); English Law Reports, 16 Q. B. D. 137

The prisoner was tried and convicted on an indictment framed under 31 & 32 Vict. c. 116, s. 1, charging that he, being a member of a copartnership called the Bedlington Colliery Young Men's Christian Association (hereafter called the association), feloniously did embezzle three several sums of money of and belonging to the said copartnership.

The object of the association was, to use the language of one of its printed rules, "the extension of the Kingdom of the Lord Jesus Christ among young men and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed twenty. Any person was eligible for membership "who gave decided evidence of his conversion to God," but, before he could become a member, he must be proposed and seconded by two members of the association and elected by the committee on their being satisfied as to his suitability. Trustees for the time being in whom the real property belonging to the association was vested became members by virtue of their appointment as trustees. Members were required to subscribe three shillings per annum. The affairs of the association were in the hands of a general committee of management, consisting of a president, two vice presidents, a treasurer, two secretaries, and at least nine members. The committee had power to suspend or expel any member whose conduct was found inconsistent in their judgment with the Christian character. The agencies for the attainment of the objects of the association were, 1st, the personal efforts of the members, 2, devotional meetings; 3d, social meetings; 4th, classes for Biblical instruction; 5th, the delivering of addresses and lectures; and, 6th, the diffusion of Christian and other suitable literature.

Before the first of the offenses charged against the prisoner was committed, the members of the association proposed to build and afterward built a hall or place of meeting for the purposes of the association at a cost of nearly £200., of which about £40, was still owing. To this building every member had the right of entry and was entitled to a latch-key.

The prisoner became a member of the association in 1878, and had continued to be a member up to the time of the trial. As and being such member he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association, toward the building fund, and toward the liquidation of the aforesaid debt of £40. Three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association was a copartnership within the meaning of 31 & 32 Vict. c. 116, s. 1, the conviction was to stand affirmed. If it was not the conviction was to be reversed.

The only question is whether this association is a copartnership. The terms of the statute clearly show that the copartnerships contemplated thereby are copartnerships in the ordinary sense of the term, viz., for the purpose of gain or profit. Lindley, L. J., in his work on Partnership, p. 1. gives an explanation of the term "partnership," which shows that the necessary idea of a partnership is that it should have for its object the acquisition and division of gain. He says: "Without attempting to define the terms 'partners' and 'partnership,' it will suffice to point out as accurately as possible the leading ideas involved in these words. The terms in question are evidently derived from to part in the sense of to divide amongst or share; and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement or otherwise. But, in order that persons may be partners in the legal acception of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit; . . . to use the word 'partnership' to denote a society not formed for gain is to destroy the value of the word, and can only lead to confusion. Nor is it consistent with modern usage. Lord Hale and older writers use copartnership in the sense of co-ownership, but this is no longer customary, and, as will be shown hereafter, there are many important differences between the two." This is not an association for the purposes of profit or gain. Lord Coleridge, C. J. The only point reserved is whether this is a copartnership. The prisoner was not indicted as one of several joint beneficial owners.

No counsel appeared for the prosecution.

LORD COLERIDGE, C. J. It seems to me that this conviction cannot be supported. I cannot find any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the

participation in profits essential to the English idea of partnership, and states that, although in former times the word "copartnership" was used in the sense of "co-ownership," the modern usage has been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a copartnership in any sense of the word into which the notion of co-partnership for the purpose of gain enters. We must construe the word "copartnership" as used in the act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a copartnership within the act. Inasmuch as we are of opinion that it is not, the conviction must be reversed.

DENMAN, J. I am of the same opinion. The word "copartnership" in the act must be construed according to the well known legal meaning of the term. If the section had only mentioned the case of a copartnership I should have thought it impossible to say that this case was within the statute. The conclusion to which we come is, in my opinion, much strengthened by the fact that the section contains another expression which covers the case of co-ownership where there is no copartnership. Here we are dealing only with the term "copartnership," for the only question reserved is whether this association was a copartnership within the section. I am clearly of the opinion that it was not.

Field, Hawkins, and Wills, JJ., concurred.
Conviction reversed.

NOT CREATED BY OPERATION OF LAW

PHILLIPS v. PHILLIPS

49 III. 437 (1863)

MR. CHIEF JUSTICE CATON delivered the opinion of the Court:

The only question in this case is one of fact. Was there a copartnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy had arisen? It must be remembered in the outset, that this is a controversy *inter esse*, and is not between third parties and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions,

and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone, cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a copartnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

Over twenty years ago John Phillips emigrated from Scotland and settled in Chicago with his family, consisting of a wife and four sons and two daughters. He was then very poor. He was a wood-turner by trade, and commenced that business in a very small way with a foot-lathe. He was frugal, industrious, and honest, and prospered as but few men, even in this country, prosper. He labored hard with his own hands, and as his sons grew up they joined their work to his, all except John S., who, at a proper age, was put as an apprentice to learn the chair-maker's trade, but his health proving delicate, his father made an arrangement with his master by which his time was released when he had but partially learned his trade, when John S. returned home and took a more or less active part in the business of his father. His health was, however, for many years, very delicate, and he was enabled to do but little physical labor. He, however, mostly took charge of the office and books, for which the testimony shows he was very well qualified, and where he rendered efficient service. In the meantime, the business had grown from the smallest beginning, with a single foot-lathe, to a large manufactory, with extensive machinery propelled by steam; and chair-making, which was introduced at an early day, had become the principal or largest branch of the business. Thus this business was begun and continued and prospered, till 1860, when the complainant left his father and the business, and filed this bill for an account as among partners.

The business had always been conducted as it was begun, in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips & Sons by persons with but a superficial acquaintance with them, which were paid without eliciting remark or particular attention. The books were all kept in the name of John Phillips, with the exception of a few entries made by a book-keeper in the name of John Phillips & Sons. Indeed, there is, and can be, no ques-

tion that if there was a copartnership embracing the father and sons, the firm name adopted was John Phillips.

The complainant, to show a copartnership, proves that the sons all devoted their time and attention to the business after they attained their majority, without regular salaries as laborers or servants; that funds which they drew from the concern for their support were charged to each one separately, while neither ever received a credit for labor or services; that the father, upon one or two occasions, stated to third persons that his sons were interested in the business, and he also relies upon the appearances to the outside public, and the interest which all took in the success of the business.

For the defense, it is claimed, that, following the habits and customs of their forefathers in Scotland, the sons continued to serve the father in the same relation and with the same fidelity after attaining their majority as before, under the distinct and often declared understanding that all should belong to the father during his life, and at his death the business and property should be left by him to his children, as he should think proper.

That this patriarchal system prevails to a much greater extent in Scotland than is familiar to us here is shown by the proof. This absolute control of the father over the property which is the fruit of the joint labor of the whole family, tends, undoubtedly, to accomplish one purpose, which was a cherished object with the father, and we may well believe was considered desirable by all, and that was, to keep the family together, and make all submissive and obedient to the father, as the head and owner, to whose discretion and will each must look for his proportion.

If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubtedly, the entire concern belonged to the father, and it so continued, unless by the agreement of the father the sons were admitted into the concern as partners; for as before intimated, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent. Did the father ever consent that his sons, or either of them, should be admitted as partners with him? Did he ever agree that they should be part owners of this property? On repeated occasions the subject of a copartnership with his sons was presented to him, both in the presence of the complainant and his brothers, and he ever repudiated the suggestion in the most emphatic terms. The very suggestion, even, seemed to excite his indignation. Upon one occasion he expressed himself in this characteristic phrase: "Na, na! I will ha' nae sons for partners as long as I live. Damn them! they

would put me out of the door." On one of these occasions do we find the complainant or any of his brothers, claiming the existence of a co-partnership, but, on the contrary, they silently acquiesced in the assertions of the father.

But, to our minds, the controlling features of the evidence in this case consist in the testimony of the complainant himself, and his brothers. The testimony of Alexander A. C. Phillips, Kidzie and Peterson, shows that the complainant was repeatedly examined as a witness in cases between John Phillips and other parties, growing out of the business of the concern, and in all of these cases he swore that he was not a partner and had no interest in the concern. He then gave the same account of the relations between the father and sons which his brothers now give. Had there been a partnership he must have known it. If he had an interest in the business, he was then aware of it, and his denial of such partnership and interest must have been willfully false. There is no middle ground upon which he can stand in innocence, if there was a partnership. All his brothers, whom the complainant alleges in this bill were members of the firm, deny that there is, or ever has been, any copartnership in this business, but that the father is the sole proprietor and that none of the sons have any interest in the business other than an expectancy upon the death of the father. This expectancy is neither a legal nor an equitable interest, and yet it powerfully allies the expectants, in feeling, sympathy, and effort, to the party or business from which they hope to realize their expectations. It often stimulates to long years of the most devoted service, as faithful and zealous as the most remunerative present reward.

That the complainant told the truth when thus examined, is testified to, as before stated, by all three of his brothers in this cause, when they all stated that there was no such partnership as is alleged in the bill; that the entire business belonged solely to their father, in whose service they labored after they became of age the same as before, and they had no interest in the business except what they might expect after his decease, and that entirely depended on his pleasure. They spoke what they must certainly have known. Had there ever been any agreement, expressed or implied, that there should be a partnership, they, as parties to it, must have been aware of it. If not expressed in words, there must have been at least the mental intention and tacit understanding on the part of the father that they should be admitted as partners, and on their part to assume the benefits and liabilities of partners, and this could not be without their knowledge. Others might be deceived by appearances. Others, ignorant of the customs and traditions of their forefathers, which are so fondly cherished by emigrants from the old country, and

particularity from Scotland, might draw erroneous conclusions as to the true relation existing between them as a family, by seeing men in middle life zealously bending their energies under the guidance of their father to the promotion of the success of the business. Whoever should apply customs prevalent among native Americans to this state of facts would unhesitatingly conclude that all were in partnership. And so, no doubt, many were deceived, nor was it deemed necessary by any of the parties, on all occasions, to undeceive them by a full explanation of this family arrangement.

But the question here is, what was the actual fact, and not what observers supposed was the fact from appearances. It is the internal truth we are seeking, and these external appearances are only important as they may enable us to arrive at this truth; and when we so find the truth by indubitable proof in a different direction than that indicated by these external appearances, then these must go for naught. Here we have the positive testimony of every living man who has the absolute knowledge of the facts, including the complainant himself, all testifying most unqualifiedly that there was no partnership. And all these witnesses stand unimpeached either directly or indirectly. True, in the appellee's argument, they are denounced in the most unmeasured terms. We, however, believe that the complainant told the truth when he swore there was no partnership, and believing this, the case is ended. If he did tell the truth, if his brothers have not committed corrupt perjury with him, then this decree was wrong, for there was no partnership. The law does not authorize us to discard this positive testimony unless we can show, from the record, sufficient reason for it. This we cannot do.

In the appellee's argument, filed *nunc pro tunc*, great complaint is made of the insufficiency and unfairness of the abstract, and had the appellee failed an amended abstract under the rule, setting forth fully the omitted portion of the record deemed important, it would have relieved us of much of the labor of this cause. The volume of testimony in the case is immense, to the great mass of which we cannot even allude in an opinion, but must content ourselves with stating our conclusions, barely alluding to some of the most vital of the proofs.

The decree is reversed and the bill dismissed.

Decree reversed.

THE ORIGINAL TEST OF A PARTNERSHIP

GRACE V. SMITH

2 Wm. Bl. 998 (1775)

Assumpsit for goods sold and delivered. Motion for new trial after a verdict for the defendant.

This was an action brought against Smith alone as a secret partner with one Robinson, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th day of March, 1767, Smith and Robinson entered into partnership for seven years, but in the November afterward some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. Smith was to have back £4,200, which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,000, part of this £5,200, or let it remain in his hands for seven years at five per cent interest, and an annuity of £300 per annum, for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. On the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one, viz. £5,200 due to him on the dissolution of the partnership, £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship; in all £7,000, for which Robinson gave a bond to Smith. On the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

Davy, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership, or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it twelve and a half per cent profits of the trade; and that he ought therefore to be considered as a secret partner. And he relied much on the case of *Bloxham & Fourdrinier against Pell & Brooke*, tried at the same sittings (7th of March, 1775) before Lord

Mansfield in the King's Bench, as in point. "This was also a partnership for seven years between Brooke & Pell; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at five per cent, which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say, 'It is usury and not a partnership.'"

Gross and Adair, for the defendant, argued that the present case is very distinguishable from that of Bloxham and Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given, as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma, that it must be either usury or partnership. It may be, and probably, was a premium for the good will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial that it appears to have been rated at £1,000 to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or by seven instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership is a question proper for a jury, who have here decided it on a consideration of all the circumstances.

DE GREY, C. J. The only question is: What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those

profits; he relies on them for repayment. And there is no difference whether that money be lent *de novo* or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial.

GOULD, J., same opinion.

BLAKSTONE, J., same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount.

NARES, J., same opinion. Rule discharged.

(See *Sailors v. Nixon-Jones Co.* for present test of a Partnership.—Ed.)

EXISTENCE OF A PARTNERSHIP DEPENDS ON THE INTENTION OF THE PARTIES AS EXPRESSED IN THE CONTRACT

SAILORS V. NIXON-JONES PRINTING COMPANY

20 Ill. App. 509 (1886)

Action by the Printing Company against Sailors, Woodward and Guibout, to recover for printing done for the "Union Mercantile Agency," under which name it was alleged that defendants were partners. Each of defendants owned an interest in certain books and business of a commercial agency, and on January 2, 1885, they agreed to unite their interests as a partnership under the name of Union Mercantile Agency. It was agreed, however, that for two years Sailors was to be relieved from any participation in the business, and during that time he was neither to share in the management nor in the profits or losses of the business. At the expiration of that time, he was to take an active part. In May, 1885, Guibout ordered the printing for which the action was brought. Guibout, in his deposition, testified that he told the plaintiff when the order was given that the firm consisted of himself, Woodward and Sail-

ors. He also testified that he told Sailors of the order and that the latter agreed to help pay. This Sailors denied. No participation by Sailors in the business was shown. Judgment for plaintiff, and Sailors appealed.

MORAN, J. The contract of January 2, 1885, between Woodward and Guibout and appellant, did not constitute appellant a partner in the business which Woodward and Guibout were to conduct in St. Louis. True, the word "partnership" is used to designate the relation of the parties but the whole agreement shows plainly that Sailors was a joint owner merely, and that the business was to be conducted wholly by the others and they were to have the entire profits accruing, and bear all losses that might happen in running the business, till, at the end of two years, Sailors was to come into a participation of the business, and thereafter share the profits and losses of the business that should be done. It was a contract which bound appellant to become a partner at the end of two years, but such contract would not make him liable for debts contracted before his relation as partner commenced. The agreement is very explicit that he shall not share the profits nor be liable for the losses. He retained only his one-third ownership in the books and good-will of the business, and had no control over its management and no right beyond seeing to the preservation of the property. The fact that the parties to such relation themselves call it a partnership will not make it so. Where the question of partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners either in fact or in law: *Parsons on Partnership*, 91. A partnership inter se must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fix the real status of the parties toward each other.

If there is no agreement, then if they deal with each other as partners, sharing losses and profits, their interest will be gathered from their acts, and they will be partners inter se. *Collyer on Partnership*, § 2 and note. A mere community of interest in property will not make the owners partners. There must be an agreement for a joint venture and to share profits and losses; and in the absence of such a mutual agreement they are mere tenants in common of the property and the act of one will not bind the other: *Chase v. Barrett*, 4 Paige (N. Y.) 148; *Niehoff v. Dudley*, 40 Ill. 406; *Smith v. Knight*, 71 Ill. 149, 22 Am. Rep. 94.

As the contract did not make appellant a partner, he could only be

held on the ground that he had held himself out as one, or authorized or assented to his being so held out. Nixon says that he knew appellant was a partner when the books were ordered, but he does not state how he knew it, and it may well be inferred that he only knew from what Guibout told him at the time the books were ordered. The question whether the appellant had been with his consent, held out as a partner to the plaintiff, was one of fact for the jury; and it was important that in determining that question the jury should be confined to whatever competent testimony was before them. The statement in Guibout's deposition that he told Nixon that appellant was one of the firm without proof that appellant authorized the statement, was incompetent, and in view of all the evidence in the case was calculated to mislead the jury. A party has a right to insist that irrelevant and incompetent testimony shall be excluded. Incompetent testimony in a deposition, though not objected to when the deposition is taken, may be objected to on the trial. The objection is not as to mere form, it is substantial: *Cooke v. Orne*, 37 Ill. 186; *Lockwood v. Mills*, 39 Ill. 602.

Nor did appellant lose his right to have the evidence excluded by failing to object to it when read from the deposition. When incompetent testimony gets into the case in the shape of depositions or otherwise, it is the duty of the Court, when required, at any stage of the trial, to exclude it or direct the jury to disregard it: *Pittman v. Gaty*, 5 Gilm. 186; *Greenup v. Stoker*, 2 Gilm. 688; *Wickenkamp v. Wickenkamp*, 77 Ill. 92.

The refusal of the Court to exclude the evidence on appellants motion was material error, and, while we are much inclined to the opinion that there was no legal evidence before the jury to support a verdict that appellant was jointly liable, still we prefer to rest the reversal on the error above specified, and remand the case for such further action as the parties may desire to take.

Reversed and remanded.

SHARING OF PROFITS BUT NOT LOSSES

DURYEA V. WHITCOMB

3 Vt. 395 (1858)

This was an action at law brought by A. & W. E. Duryea against Whitcomb, to recover what plaintiffs claimed to be their share of a joint enterprise entered into by plaintiffs, defendant and one Lewis. Plaintiffs and Lewis resided in New York city and Whitcomb in Vermont. The agreement was that Whitcomb should, on the joint account, buy

potatoes in Vermont and New Hampshire, to be sent to New York and other markets. Whitcomb was to have a fixed price per bushel for buying, and the net profits were to be divided in accordance with the contributions of the parties. The auditor who heard the case found defendant indebted to plaintiffs in the sum of \$845.45. Defendant claimed that the arrangement constituted a partnership, and that therefore the affairs could not be adjusted in this form of action. The auditor found that the parties said nothing about partnership and that neither of the parties supposed they were forming a partnership or intended to form one. Defendant appealed.

ALDIS, J. As this is a case where the rights of the partners inter se merely are concerned, where no question as to third persons is involved, the criterion to determine whether the contract is one of partnership or not, must be, what did the parties intend by the contract which they made as between themselves?

If we regard the agreement itself, as set forth in the auditor's report, it is clearly a partnership. The agreement was verbal, but by the finding of the auditor may be considered as in writing at this time. Giving to the contract, as stated in the report, the same construction that we should to articles in writing of the same tenor, it appears to us to have every ingredient of a partnership.

The parties all furnish a share of the capital, Whitcomb one-half, Lewis one-quarter, the Duryeas one-quarter. They jointly own the property when purchased. It is purchased in order to be sold again for their joint and mutual benefit, thereby negating the idea of separate control and disposition of their interests in the property purchased, and of separate interests in the proceeds. Each is to share in the final profit or loss; at the close of the season the profits or losses are to be divided, to Whitcomb one-half, to Lewis one-quarter, to the plaintiffs a quarter. Each is to aid in selling, and to contribute his aid, skill, and knowledge to get the highest price.

The case of *Griffith v. Buffum*, 22 Vt. 181, 54 Am. Dec. 64, post, where the defendants were held to be partners as between themselves, is not so strong to show a partnership as this; for there the agreement to share in the losses seems to have been implied whilst here it is expressed.

The fact that each was to be accountable for his own sale, amounts only to this, that each should sell for cash; if either did not, he was to be accountable for his sale as cash. The proceeds of the sales by each would belong to them jointly, not severally. This provision is as consistent with an agreement for a partnership as with any other: *Noyes v. Cushman*, 25 Vt. 390. So that Whitcomb was to have the control

of the potatoes, and to run them to the best market, taking the advice of Lewis and Duryeas on the subject, is, when we consider where the parties resided, where the potatoes were to be bought, and to what markets they might be sent, and that Whitcomb was to buy them, as consistent with a contract of partnership as with any other.

I. This agreement does not belong to the class of cases where the parties are jointly interested in certain proportions in the property purchased, but not in the final profits or losses; where each of the part owners has the power of separate disposition of his interest. Such is the case of *Coope v. Eyre*, 1 H. Bl. 37, post, a leading illustration of the class.

II. It is not of the class where a party receives a portion of the profits as a compensation for his labor as an agent or servant. Each furnished a portion of the capital, each was a part owner of the property when purchased, and of the proceeds when sold. Neither could be said to be the servant or agent of the other. An agent who receives a share of the profits as a compensation for his services, is not expected to share in losses; if there are no profits he loses his labor or wages, but he loses no more, though there are further losses to be borne by the partners.

Of this class is *Kellogg v. Griswold*, 12 Vt. 291; and *Mason v. Potter*, 26 Vt. 722.

III. Nor is it a case where a share of the gross or net earnings is to be paid as a compensation for the use of capital, or as rent; and where the party receiving such compensation has no interests in the business, the property and the proceeds, but only a right of action against the other parties. Here the parties jointly contributed capital, labor, and skill, were joint owners of the property from the time of its purchase till the final division of profits or loss. No severance of their interests could be had, no ascertainment of their respective shares or interests could be made till a final accounting. They must have relied on the property and its proceeds to secure to each his final share, no matter by whom the property might be sold, or its proceeds held.

Hence the cases of *Tobias v. Blin*, 21 Vt. 544; *Bowman v. Bailey*, 10 Vt. 170, and *Ambler v. Bradley*, 6 Vt. 119, do not apply. Of the same class are *Denny v. Cabot*, 6 Met. (Mass.) 92; *Holmes v. The Old Colony R. R. Co.*, 5 Gray (Mass.) 58; *Loomis v. Marshall*, 12 Conn. 69, 30 Am. Dec. 596, and various other cases cited by counsel.

It is said, however, that the auditor finds that the parties did not intend to form a partnership, and that such intention must govern.

It is with contracts of partnership as with all other contracts, that as between the parties to them their intention must govern. Hence an express stipulation in a contract that the parties thereto shall not thereby become partners, is binding and of great significance in giving

construction to the instrument, especially if the terms are doubtful or susceptible of more than one meaning.

I. It is to be noted that in this case there was no such express stipulation. The auditor's report says "at the time of the arrangement in New York, August 20, 1854, nothing was said about a partnership, and neither of the parties at that time supposed they were forming a partnership, or intended to form a partnership." As nothing was said about a partnership, the parties could not have stipulated that their contract should not create one.

II. The report states what was the arrangement of August 20, 1854. That was a contract for a partnership. If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. One is at a loss to perceive how the auditor could discover such an intention when nothing was said about a partnership, and when the contract, which they made, was a partnership. Probably the fair construction of the report is that the parties were not aware of the legal extent and obligation of the contract into which they entered.

As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses.

IV. The action is book account. The accounts presented for adjustment are all partnership accounts. None of them are properly chargeable on book. The case of *Green v. Chapman*, 27 Vt. 236, has settled the construction of the statute of November 18, 1852, viz; that where there are no items properly chargeable on book, the action of book account will not lie for the judgment of other items proper for the action of account.

The result is that the judgment of the county court is reversed and judgment rendered for the defendant to recover his costs.

EVIDENCES OF INTENTION

BEECHER v. BUSH

45 Mich. 188 (1881)

COOLEY, J. The purpose of the action in the Court below was to charge Beecher as partner with Williams for a bill of supplies purchased

for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the Courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names

go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary:" Kent, C. J., in *Post V. Kimberly*, 9 Johns. 470, 504.

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the indicia of partnership in this case; the marks which force that construction upon the Court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the elaborate and able brief which has been presented in behalf of the defendants in error, it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits, and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in *Hinman v. Littell*, 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions: *Eager v. Crawford*, 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where

the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words: *Loomis v. Marshall*, 12 Conn. 69, 79.

In *Cox v. Hickman*, 8 H. L. Cas. 268, 306, Lord Cranworth stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf—i. e., that he stood in the relation of principal toward the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

It is said, and we believe justly, in *Bullen v. Sharp*, L. R. 1 C. B. 86, that the decision in *Cox v. Hickman* brought back the law of England to what it should be, and Mr. Baron Bramwell, referring to what was declared to be law in *Waugh v. Carver*, 2 H. Bl. 235, 2 Smith's Lead. Cases, 9th Amer. ed. 1178, expressed the hope "that this motion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books:" p. 128. It is certainly overruled very conclusively in Great Britain; *Kilshaw v. Jukes*, 3 B. & S. 847, 113 Eng. Com. Law; *Shaw v. Gault*, 16 Irish C. L. R. 357; *Holme v. Hammond* L. R. 7 Exch. 218; *Ex parte Delhasse*, 7 Ch. Div. 511. And though in New York, the Courts, hampered some-

what by early cases, have not felt themselves at liberty to adopt and follow the decision in *Cox v. Hickman* to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed, that is very well shown in *Eastman v. Clark*, 53 N. H. 276, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which, in their facts, have a resemblance, more or less strong, to the one before us.

Champion v. Bostwick, 18 Wend. 175, was a case where parties who were severally owners of horses and stages on different parts of one stage line made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of *Eastman v. Clark*, 53 N. H. 276, the conclusion of partnership or no partnership, it was said, must be drawn as one of fact. "The real and ultimate question," says Smith, J. (p. 289), "in all cases like the present, is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation existed is a question of fact There is no sound foundation for an arbitrary rule of law requiring Courts or juries to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and *Musier v. Trumpbour*, 5 Wend. 274, and *Everitt v. Chapman*, 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of *Loomis v. Marshall*, 12 Conn. 69, can hardly be considered in accord with it. The facts were these: B had a cloth factory. A agreed with him to furnish a full supply of wool for two years, B to devote the factory for two years exclusively to manufacturing, and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in

the proportion of 55 per centum to A and 45 per centum to B, and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says Huntingdon, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it a partner must not only share in the profits, but share in them as a principal; for the rule is now well established that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner. And of the share set off to B he says it "is not expressed in terms to be for such compensation; but this is its legal meaning;" pp. 77, 79. *Moore v. Smith*, 19 Ala. 774; *Bowman v. Bailey*, 10 Vt. 170, and *Price v. Alexander*, 2 Greene (Ia.), 427, may be referred to for similar views.

One of Chief Justice Gibson's short but very lucid opinions is in point here. Between Bronson, a manufacturer, and Dunham, a country merchant, there was an agreement that the former should furnish wooden handles made to order to the latter, at a tariff of prices to be paid out of the store, on the proceeds of the handles; Bronson finding the labor and stuff, and receiving a further compensation for skill and the rent of the storehouse, in the form of a commission of fifty per centum on the net profits of the whole. It was sought to charge Dunham as a partner with Bronson for the price of raw material the latter had bought. Upon these facts it is said: "Now, it has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes a partnership that the point is at rest. What staggers the mind in this instance is the apparent shallowness of the distinction when it is considered that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and that, whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same. But by the terms of the contract Bronson and not Dunham was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision I admit would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming for the moment that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is to be borne in mind that the handles, as well as the store goods were to be put into the concern as separate contributions to the joint stock; and that, as the stuff for the handles was to be procured by Bronson it was consequently to be paid for by him, just as the store goods were to be procured and paid for by Dunham, having been purchased on separate

account. There may be a partnership for selling and not for buying; or for buying and not for selling; or for both buying and selling, which is the most usual: as if several put separate quantities of wheat into a common stock to be ground into flour and sold on joint account; or agree to buy jointly and divide the article when bought; or agree to buy and sell on joint account. In the first case each would be liable for his own purchases only; but in the second and third cases, each would be liable for the whole. Now if there were any partnership in this instance it would be of the first class; and in any view of the case the defendant would not be liable:" *Dunham v. Rogers*, 1 Pa. St. 255, 262.

Not dissimilar to this is the case of *Denny v. Cabot*, 6 Met. 82, which was also a case in which one party supplied the raw material and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and services; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. *Perrine v. Hankinson*, 11 N. J. 181, is relied upon as authority, among other cases. The same doctrine was reiterated in *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58; *Bradley v. White*, 10 Met. 303; and by Day, J., in a careful opinion in *Harvey v. Childs*, 28 Ohio St. 319, already referred to.

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective had been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged in a partner unless by contract and with intent he has formed a relation as which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this busi-

ness? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short, what one act might he do or authority exercise which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and, therefore, have not deemed it necessary to exclude.

On the other hand, what single act are we warranted in inferring the parties understood Williams was to do for, and as the agent of, Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies or overrule his judgments. He did, indeed, agree to take and account for whatever furniture should be

brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration for that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If, therefore, we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnerships must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams's assent was required.

There is another view of this case that seems to us conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel and we must suppose had his clerk there. These were facts open and patent to the whole world who had occasion to go there or to deal with

Williams. They naturally suggested the inquiry what was the arrangement between the parties; and there is nothing in the case to indicate that plaintiff in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If, therefore, there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher. Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity, or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an account in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

WHO MAY BE PARTNERS

ADAMS V. BEALL

67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. Rep. 664 (1887); *Appeal from the Baltimore City Court*

ROBINSON, J. The appellee, while a minor, paid to the appellant \$2,900, as a consideration for being admitted as a partner in the appellant's business. The partnership continued for more than a year, and, finding it unprofitable, the appellee, without formally dissolving the partnership, withdrew from the business. The question in the case is whether the appellee is entitled to recover of the appellant the money thus paid. His right to disaffirm the partnership contract, and to avoid all liabilities under it, including the partnership debts, is not denied. Being an infant when the contract was made, this is a privilege to which for his protection he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed or has had the benefit of, this presents quite another question. The \$2,900 was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one, but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed. The privilege of infancy, says Lord Mansfield in *Zouch v. Parsons*, 3 Burrows 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right, not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership, would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

So long ago as *Brawner v. Franklin*, 4 Gill (Md.), 463, it was held that where an infant advances money upon a contract, he cannot disaffirm the contract and recover the money advanced, if he has enjoyed the consideration for which the money was paid. *Holmes v. Blogg*, 8 Taunt. 508, is to the same effect. There the infant paid a sum of money as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant dissolved the partner-

ship, and brought an action to recover back the money he had paid the lessor for his lease. Gibbs, C. J., said: "He may, it is true, avoid the lease; he may escape the burden of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it. The law does not enable him to do that."

It is a mistake to suppose that the principle on which this case was decided was either overruled, or even questioned, in *Corpe v. Overton*, 10 Bing. 252. In the latter case, the plaintiff, while an infant, signed an agreement to enter into partnership with the defendant, and to pay him £1,000 for a share in the business; and to execute, on the first day of January, a partnership deed, with the usual covenants. He also paid £100 as a deposit for the fulfillment of his part of the contract. The plaintiff afterwards disaffirmed the partnership contract, and never did in fact become a partner. The suit was brought to recover of the defendant the £100 paid by the infant as a deposit. Tindal, C. J., said: the case was distinguishable from *Holmes v. Blogg*. In that case the plaintiff and partner occupied the premises from March till June, and the money was paid for something available, that is, for three months enjoyment of the premises. "In the present case, the plaintiff has paid to Overton £100 for which he has not received the slightest consideration. The money was paid either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. Now, the partnership was not to be entered into till January, 1833, and in the meanwhile the infant has derived no advantage whatever from the contract. Bosanquet, J.: "We are far from impeaching *Holmes v. Blogg*, as applicable to the facts of that case. . . . Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. . . . The £100 paid here was in the nature of a deposit. Money paid on a deposit may generally be recovered back where the contract goes off, and here the contract was defeated before the infant derived any benefit from it." Alderson and Gaselee, JJ., were of the same opinion. The plaintiff was allowed to recover the deposit money paid by him, while an infant, because the partnership contract was disaffirmed by Corpe before the time agreed upon for it to begin. As it was said by Alderson, J., "Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made." The distinction between *Holmes v. Blogg*, and *Corpe v. Overton* is this: In the former the plaintiff was not allowed to recover the money paid by him while an infant, because it was paid on a consideration which he had in part enjoyed, while in the latter the plaintiff was allowed to recover as upon an entire failure of consideration.

Passing, then, from these cases, we come to *Ex parte Taylor*, 8 De Gex, M. & G. 254, which is a case directly in point. There an infant paid a premium on entering into a partnership, and, before he came of age, disaffirmed the contract, and, upon the bankruptcy of the firm, attempted to prove for the premium thus paid. Lord Justice Knight Bruce said: "In my opinion, a case of fraud has not been established. That being so, the matter remains one of a contract fairly made, or as fairly made as a contract with an infant could be made, a contract upon which the infant acted during his minority, and which during his minority has been in part performed on each side. In such a state of things, I conceive that, if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question, there must have been either a nonsuit or a verdict against him." Lord Justice Turner said: "It is clear, an infant cannot be absolutely bound by a contract entered into during his minority. He must have the right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question, whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but, if he does pay for it during his minority, he cannot on attaining his majority recover the money back."

We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And while fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet, in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid unless he was induced to enter into the partnership by the fraudulent representations of the appellant. Whether an infant can avoid a contract and sue thereon during his minority, or must wait until he arrives at age, is a question about which the decisions are conflicting. To hold that he cannot disaffirm a voidable contract until he attains his majority would in many cases work the greatest injustice to an infant. And where the contract is of a personal nature, or relating to personal property, we see no good reason why such a contract may not be avoided, either before or after his majority. *Stafford v. Roof*, 9 Cow. 626; *Shipman v. Horton*, 17 Conn. 481; *Willis v. Twambly*, 13 Mass. 204.

The court having erred in granting the plaintiff's first and second prayers, the judgment must be reversed. Judgment reversed, and new trial awarded.

PARTNERSHIP IS NOT INDISSOLUBLE

SOLOMON V. KIRKWOOD

55 Mich. 256, 21 N. W. Rep. 336 (1884)

The plaintiffs, who are, in the city of Chicago, dealers in jewelry, seek to charge the defendants, as partners, upon a promissory note for \$791.92, bearing date November 9, 1882, and signed "Hollander & Kirkwood." The note was given by the defendant Hollander, but Kirkwood denies that any partnership existed between the defendants at the date of the note.

The evidence given on the trial tends to show that on July 6, 1882, Hollander & Kirkwood entered into a written agreement for a partnership for one year from the first day of the next ensuing month, in the business of buying and selling jewelry, clocks, watches, etc., and in repairing clocks, watches, and jewelry, at Ishpeming, Michigan. Business was begun under this agreement, and continued until the latter part of October, 1882, when Kirkwood, becoming dissatisfied, locked up the goods and excluded Hollander altogether from the business. He also caused notice to be given to all persons with whom the firm had had dealings that the partnership was dissolved, and had the following inserted in the local column of the paper published at Ishpeming: "The copartnership heretofore existing between Mr. C. H. Kirkwood and one Hollander, as jewelers, has ceased to exist, Mr. Kirkwood having purchased the interest of the latter." This was not signed by any one.

A few days later Hollander went to Chicago, and there, on November 9, 1882, he bought, in the name of Hollander & Kirkwood, of the plaintiffs goods in their line amounting to \$791.92, and gave to the plaintiffs therefor the promissory note now in suit. The note was made payable December 15, 1882, at a bank in Ishpeming. When the purchase was completed Hollander took away the goods in his satchel. The plaintiffs had before had no dealings with Hollander & Kirkwood, but they had heard that there was such a firm, and were not aware of its dissolution. They claimed to have made the sale in good faith, and in the belief that the firm was still in existence. On the other hand, Kirkwood claimed that Hollander and the plaintiffs had conspired together to defraud him by a pretended sale to the firm of goods which the plaintiffs knew Hollander intended to appropriate exclusively to himself; and he was allowed to prove declarations of Hollander which, if admissible, would tend strongly to prove such a conspiracy.

The questions principally contested on the trial were—First, whether the acts of Kirkwood amounted to a dissolution of the partnership;

second, whether sufficient notice of dissolution was given; and, third, whether there was any evidence to go to the jury of an understanding between Hollander and the plaintiffs to defraud Kirkwood. The trial judge, in submitting the case to the jury, instructed them that Kirkwood, notwithstanding the written agreement, had a right to withdraw from the partnership at any time, leaving matters between him and Hollander to be adjusted between them amicably or in the courts; and for the purposes of this case it made no difference whether Kirkwood was right or wrong in bringing the partnership to an end; if wrong, he might be liable to Hollander in damages for the breach of his contract. Also, that when partners are dissatisfied, or they cannot get along together, and one partner withdraws, the partnership is then at an end as to the public and parties with whom the partnership deals, and neither partner can make contracts in the future to bind the partnership, provided the retiring partner gives the proper notice. Also, that if they should find from the evidence that there was trouble between Hollander and Kirkwood prior to the sale of the goods and the giving of the note; that Kirkwood informed Hollander, in substance, that he would have no more dealings with him as partner; that he took possession of all the goods and locked them up, and from that time they ceased to do business—then the partnership was dissolved. Further, that whether sufficient notice had been given of the dissolution was a question for the jury. Kirkwood was not bound to publish notice in any of the Chicago papers; he was only bound to give actual notice to such parties there as had dealt with the partnership. But Kirkwood was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and on this branch of the case the question for the jury was whether Kirkwood gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note; if he did not, he would still continue liable.

The judge also submitted to the jury the question of fraud in the sale of the goods. The jury returned a verdict for the defendants. Plaintiff brings error.

COOLEY, C. J. (After stating the facts as above.) I. We think the judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and after such publication the other

members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it." *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 538, 10 Am. Dec. 286. To the same effect are *Mason v. Connell*, 1 Whart. (Pa.) 381, and *Slemmer's Appeal*, 58 Pa. St. 155. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases.

II. The instruction respecting notice was also correct. No court can determine for all cases what shall be sufficient notice and what shall not be; the question must necessarily be one of fact. Publication of notice of dissolution in a local newspaper is common, but it is not the only method in which notice can be given. The purpose of the notice is to make notorious in the local community the fact that a dissolution has taken place; and publication of a notice may or may not be the most effectual means for that purpose. Very few persons in any community probably read all the advertisements published in the local papers; and matters of local importance which are advertised are quite as likely to come to them from other sources as from the published notices.

That publication in a newspaper is sufficient, is not disputed by the defense, provided it appears on its face to be authoritative. *Ketcham v. Clark*, 6 Johns. (N. Y.) 144; 5 Am. Dec. 197; *Graves v. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *National Bank v. Norton*, 1 Hill (N. Y.) 578; *Nott v. Douming*, 6 La. 680; 26 Am. Dec. 491; *Watkinson v. Bank of Pennsylvania*, 4 Whart. (Pa.) 482; 34 Am. Dec. 521; *Rose v. Coffield* 53 Md. 18; 36 Am. Rep. 389. But in this case it is said the notice did not appear to be authoritative; it appeared as a local editorial item, and such items are often baseless, and may in any particular case have no better foundation than rumor or even suspicion. They do not bear upon their face the verity which a notice signed by the party would import.

All this may be true without being conclusive. When the purpose is to put the fact of dissolution before the public, it certainly cannot be affirmed that the purpose is more likely to be accomplished by a formal advertisement than by an item in the local column of the newspaper. Many publishers, it is believed, have in their papers a local column in which items appear which seem on their face to be editorial, but which are really advertisements; and not only paid for, but paid at extra rates, for the reason that in that column they would be more likely to be seen and read than if published as advertisements in the ordinary way. When such is the case, a court could hardly hold as matter of law that the advertisement would be sufficient, but the notice in the local column not. To do so would be to make form more important than the purpose to be accomplished. One who derives knowledge of the fact from public notoriety is sufficiently notified: *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; and probably in many small communities a fact would sooner be made notorious by a notice in the local column of the county or village paper than in any other way. In a large city it might be otherwise. But all that can be required in any case is that such notice be given as is likely to make the fact generally known locally: *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183, 193; *Lovejoy v. Spafford*, 93 U. S. 430. When that is done the party giving the notice has performed his duty, and any one contemplating for the first time to open dealings with the partnership must at his peril ascertain the facts. This, in effect, was the instruction given.

III. But we think the judge erred in receiving evidence of Hollander's admissions or declarations tending to show fraudulent collusion between him and the plaintiffs. The declarations of a conspirator may be evidence against his associates after the conspiracy is made out; but to receive them as proof of the conspiracy would put every man at the mercy of rogues. We find in this case no evidence of the conspiracy except in the statements of Hollander; and those having been erroneously received, there was nothing on that branch of the case to submit to the jury.

For this error there must be a new trial.

IN THE ABSENCE OF AN EXPRESS AGREEMENT A
PARTNER IS NOT ENTITLED TO COMPENSATION
FOR HIS SERVICES

LINDSEY V. STRANAHAN

129 Pa. St., 635, 18 Atl. Rep. 524 (1889)

Action for accounting of partnership transactions. It appeared that J. A. Stranahan had carried on business alone until 1876, when J. K. Lindsey bought a half interest in it and the two united as partners under the firm name of J. K. Lindsey & Co. After the formation of the firm Stranahan left the entire management and control of the business to Lindsey. On the settlement, Lindsey claimed compensation for thus managing the business. The matter was referred to masters in chancery to state an account, and they reported, among other things, as follows: "No express agreement or contract was made by said partners that either of them was to receive compensation for services rendered by either of them in the business of the partnership; but as Lindsey took credit for his services from time to time on the books of the firm, and such books were open to the inspection of Stranahan, he must be presumed to have known the fact and to have assented thereto; and, as it is not to be presumed that the said Lindsey would render his services in managing the affairs of said partnership for nothing, we, therefore, find as a fact, that there was an implied contract that Lindsey should receive such compensation for his services as they were reasonably worth." They therefore credited him with "salary, \$3,700."

The court below disallowed this claim, and Lindsey appealed.

PER CURIAM. There is but a single question in this case: Is J. K. Lindsey, the plaintiff, entitled to compensation for his services as a partner? It is conceded that there was no express contract that he should be paid for such services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contest between the partners upon the settlement of every partnership account, as to the value of their respective services. It is true this principle may work hardship in particular cases: almost every general rule does, but that is a weak argument against the soundness of the rule. When the copartnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then

made, as before said, the law will not imply one. Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although, in such case, he performs all the service; *Beatty vs. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Brown vs. McFarland*, 41 Pa. 129, 80 Am. Dec. 598; *Gyger's Appeal*, 62 Pa. 73, 1 Am. ep. 382; *Brown's Appeal*, 89 Pa. 139.

Judgment affirmed.

OF WHAT DOES A PARTNER'S INTEREST CONSIST?

STAATS V. BRISTOW

73 N. Y. 264 (1878)

Staats brought this action against Bristow, who was the assignee of Stockbridge & Martin, to establish the title which plaintiff claimed in the property of that firm now in defendant's possession. Plaintiff relied upon his purchase at a sheriff's sale.

Other facts appear in the opinion.

Defendant had judgment below.

FOLGER, J. The defendant had the possession of certain personal property, to which the plaintiff claims that he was entitled. It was, of course, incumbent upon the plaintiff to show and establish his title. He showed that he was the purchaser at a sheriff's sale. The certificate given by the sheriff does not say that the plaintiff bought the property itself; it says that he bought, only, all the right, title, and interest which Joseph Stockbridge had in it on the 30th November, 1874. The sheriff's return on the execution upon which he sold is the same. The execution on which the sale took place directed a sale of the property of the defendants therein named, who were the Stockbridge above named, and his copartner, Martin; but the property pointed at was what they owned, or either of them owned, on a day named, to wit; on the 9th December, 1874; and before that day, to wit: on the fourth day of that month, the defendants in the execution had assigned the property to the defendant in this action in trust for all of their creditors.

So it is apparent that the plaintiff did not buy the property itself, specifically; but only the interest, right, and title which Stockbridge had in it. Now the interest which he had in it was that of one of two partners; as the property was part of the assets of a copartnership firm of which he was a member. The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the copartnership, in the surplus of those assets remaining after all partner-

ship debts are fully paid. It appears in this case that the firm was insolvent; that its debts much exceeded its assets; that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property was nothing; and so the plaintiff got nothing by his purchase.

The force of these views is resisted by the plaintiff thus: It is claimed, and rightly, that one partner may sell and transfer the entirety of any particular personal effects and property of the partnership for purposes within the scope of the business, and can make sale to a creditor of the firm in payment of a debt due, without the knowledge or consent of another partner, though the firm be insolvent and thereby a preference be given to the creditor vendee. Then, it is claimed that the law may do whatever one partner can do. Let it be granted that it may, for this occasion, though we do not concede it as a universal principle. The law has not in this case undertaken to do that. The attachment, under which it is claimed that the first step was taken toward doing that, was not against this property specifically, nor was it against the property of the firm. It was against the property of Stockbridge. What was the property of Stockbridge? It was what he owned in individual right, and it was his interest in the property of his partnership. What that interest was has already been shown. So that the law did not undertake to do, nor has it done, more than to sell for the benefit of a firm creditor the property of Stockbridge. We speak now of what was done by virtue of the attachment alone. The action was against both partners, and both were brought into court. But if both had not been brought into court, and judgment had been got, and execution issued directed to be levied upon the sole property of the one served, and upon the joint property of both, the law would have undertaken to do what we admit one partner can do; and if this joint property had been levied upon before the assignment to defendant, and had been sold to the plaintiffs in the execution, or to one of them, and the avails paid over, the law would have succeeded in doing just what one partner could have done. The law must seek the end desired by the legal path, just as the single partner must. That path was not by an attachment against the property of one partner who, by his personal situation, was obnoxious to that process. That could issue, but not against joint property; only against individual property; and individual property was only the interest in a surplus.

These views do not conflict with *Van Brunt v. Applegate*, 44 N. Y. 544, on which the appellant much relies, and we do not express any opinion upon what was there held.

The judgment appealed from should be affirmed.

A PARTNER CAN NOT PURCHASE FIRM PROPERTY FOR HIS
OWN BENEFIT

JONES v. DEXTER

130 Mass. 380, 39 Am. Rep. 459 (1881)

Bill in equity by Jones against Dexter and two others to settle the affairs of a partnership. Jones and Dexter had been partners but the partnership had been dissolved and Jones had become insolvent. Some years later Dexter, as solvent partner, in order to close up the affairs of the firm, advertised for sale by auction all the remaining assets of the firm, employed an auctioneer, and caused the sale to be made. Among the assets of the firm was an interest in a whaling vessel, the *Ocean Rover*, her fittings and catchings, which had been destroyed by the insurgent cruiser *Alabama*. This interest was offered for sale. Jones did not consent to the sale, though he knew of it, and was present, with his assignee in bankruptcy. Jones made a bid upon the *Ocean Rover* when offered for sale but one LeBarron bid more, and the interest in her was sold to him for \$12. It transpired that LeBarron made the bid in pursuance of an arrangement with Dexter to bid it in for him. Dexter made an assignment of the interest in the firm name to LeBarron and the latter assigned it back to Dexter. LeBarron never actually paid the \$12, and said he did not consider the interest worth anything. Later the Commissioners on Alabama claims awarded \$1564 (paid to Dexter) for the firm's interest in the vessel, and \$55,068 (paid to the other defendants) for her total earnings and catchings, in which sum also the firm was entitled to a share. Jones by this bill claimed the right to share in these sums. Decree below for Jones and Dexter appealed.

SOULE, J. The general rule is familiar, that a trustee will not be permitted to make a profit out of the trust property; and that if he purchases it, even at a public auction, he will hold it for the benefit of the cestui que trust, and, if any profit is made upon it, he must account for it as trustee. Perry on Trusts §427. This rule applies to cases where one deals with property as agent for another, and to all those cases in which confidence is reposed, and one has it in his power, in a secret manner, for his own advantage to sacrifice the interests which have been entrusted to him. Story Eq. Jur. § 323. In all such cases, the cestui que trust has his election to avoid the transaction which was intended to benefit the trustee, and to treat the subject matter of the trust as if no change had been made in its situation, so long as the trustee has not disposed of the property to a bona fide holder for value. Wyman v. Hooper, 2 Gray, 141.

The application of this principle to the case at bar is plain. The defendant Dexter was acting for himself and his former partner, and the assignee in bankruptcy of his partner, in closing up the affairs of the partnership. When he undertook to sell the interest of the partnership in the Ocean Rover and its outfits and catchings, he had no right, as against the other parties in interest, to make a secret arrangement, by which a stranger should purchase the interest for him. And when the purchase was made in accordance with that secret arrangement, and the interest, after being conveyed to the purchaser, was conveyed by him to Dexter in pursuance of the secret arrangement, Dexter held it for the benefit of the partnership, and not for his personal benefit.

We have assumed, in what we have said, that such secret arrangement was made and acted on, because we are of opinion that the agreed facts and evidence call for a finding to that effect. Such finding is a sufficient foundation for a decree against the defendants.

It has already been decided that, inasmuch as the debts which the plaintiff owed when he went into insolvency have been paid, and his assignee in insolvency disclaims all interest in the subject matter of the suit, and assents to the maintenance of the bill, the plaintiff, if any one, is entitled to the relief asked for. *Jones v. Dexter*, 125 Mass. 469. The result is, that the decree appealed from must be affirmed.

DUTY OF PARTNER TO ACCOUNT FOR MONEY RECEIVED

BALDWIN V. POTTER

46 Vt. 402 (1874)

General Assumpsit. Plea, the general issue, and trial by the Court, September Term, 1873, Royce, J., presiding.

The case was tried upon the following agreed statement of facts:

"The plaintiffs were merchants and partners, residing and doing business at St. Albans, Vt. They employed the defendant to solicit orders for and sell an article known and called 'prize candy' on commission. It was the practice of the parties, under said employment, for the defendant to solicit and take orders for said goods, and send such orders to the plaintiffs, who would thereupon send the candy to the parties ordering it, and charge it directly to the purchaser, on the plaintiffs' books, and for the defendant, when convenient, to make collections in respect thereof for the plaintiffs' receipt, therefore, notify the plaintiffs thereof, and pay the amounts collected over to the plaintiffs on demand.

"The defendant entered upon said business; and in November, 1870,

and January, 1871, he sent orders for said candy for various parties in the State of New York to the amount of \$103, and afterward, in August and September, 1871, collected the pay for the same as the plaintiffs' agent. In November and December, 1870, and February and March, 1871, the defendant sold and sent orders to the plaintiffs from various parties in the State of Massachusetts for said candy to the amount of \$210.52, and afterward, in August and October, 1871, collected pay for the same as the plaintiffs' agent. During the years 1870 and 1871 the defendant sold and sent orders for said candy from various parties in Vermont to the amount of \$215.57, and afterward, in August, September, and October, 1871, collected the pay for the same as the plaintiffs' agent.

"On the delivery of said goods by the plaintiffs they charged the same to the purchasers on their books, and on receiving notice from the defendant of said collections they credited to such purchasers the amounts thereof. The plaintiffs delivered to the defendant four silver dollars and four silver half-dollars as samples of the prizes contained in certain of said prize candy packages, which, with the premium thereon, were of the value of \$6.72, and which the defendant has never returned nor accounted for to the plaintiff. It is agreed that the commission to which the defendant is entitled is equal to and shall be set off against items in the plaintiffs' favor; specification not included in the amounts aforesaid.

"Said prize candies were of three kinds, and were known and called the 'Challenge,' 'Gem,' and 'United States Silver Coin,' and were put up in packages designed to be sold at retail for a certain price per package. Each package, in addition to a quantity of candy, contained a prize of some value; and the inducement to purchase one or more of the packages at retail was the chance of receiving with the candy a prize, some of which were of greater value, and some of less value, than the price paid. The plaintiffs, at St. Albans, put up said candy in packages, with a prize in each package, and put up the packages in boxes containing a certain number thereof. The plaintiffs sold said candy by the box only, and each box of the several kinds contained the same amount of candy and the same prizes, and the prizes contained in each box were printed on the outside and on printed circulars; and cards were used by the plaintiffs, and the defendant as their agent, in connection with the sale thereof, stating particularly the kind and value of each article contained in the box as a prize; and each purchaser thereof from the plaintiffs was informed and knew the amount of candy and the exact number, value, and kind of articles as prizes contained in each box that he bought; and the plaintiffs knew that such purchasers

intended to sell the same at retail, in the vicinity of the place of purchase, and that the prizes would be drawn as hereinbefore stated by the retail purchasers thereof.

"In respect to said business, and in the collection of said money, the defendant acted solely as the agent of the plaintiffs. On the 18th of October, 1871, the plaintiffs demanded of the defendant to account to them for the money collected by him as aforesaid, and said silver coins, and to pay over the amount thereof to them, but the defendant absolutely refused, and ever since hath refused so to do, and has never paid the same nor any part thereof.

"If upon the foregoing facts the Court is of opinion that the plaintiffs are entitled to recover for the sums as stated, which were collected upon sales in the States of New York, Massachusetts, and Vermont, or either of said States, or for said silver coins, judgment shall be rendered for the plaintiffs for such sums, and interest from the date of collection of the money and the date of the delivery of the coin. If the plaintiffs are not entitled to recover in respect of any of said items, then judgment shall be rendered for the defendant to recover his costs."

An agreement was also made as to some of the provisions of the statutes of New York and Massachusetts relating to offenses against public policy in force at the time of said sales. The Court rendered judgment for the plaintiff, pro forma, to recover the full amount claimed, with interest thereon as stipulated, and found that the defendant received said money in a fiduciary capacity and converted the same to his own use, and adjudged, pro forma, that the cause of action arose from the willful and malicious act and neglect of the defendant, and that he ought to be confined in close jail; to all which the defendant excepted.

PIERPOINT, C. J. We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void or not. This action is not between the parties to those contracts; neither is it founded upon or brought to enforce them. If those contracts were illegal the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs authorized to receive it. When the money was so paid it became the plaintiffs' money, and when it was received by the defendant as such agent the law, in consideration

thereof, implies a promise on the part of the defendant to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case: *Tenent v. Elliot*, 1 B. & P. 2; *Armstrong v. Toller*, 11 Wheat, 257; *Evans v. City of Trenton*, 4 Zab. (N. J.) 764.

We think the certificate granted by the County Court was properly granted. It has been urged in behalf of the defendant that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the County Court affirmed.

DISSOLUTION AND NOTICE

HOARD V. CLUM

31 Minn. 186, 17 N. W. Rep. 275 (1883)

Action for an accounting and the winding up of the affairs of a partnership. The plaintiffs in the action are three of the partners and the widow and heirs-at-law of a fourth partner, and the defendant is the only other partner. From the articles which are dated March 15, 1880, it appears that the partnership was formed, under the name of the Clum Compounding Company, for the purpose of manufacturing and selling a medicine, and that the partnership was "to have an existence of thirty years from the date of these articles, unless sooner dissolved by mutual consent." The articles also provide for the taking of inventories at stated times, and that, in case any member of the partnership may wish at any time to dispose of his interest in the business, the other partners are to have the right to purchase such interest by paying its value as determined by the last preceding inventory. The

articles then provide that "in case of death of any member of the company, the heirs of such member may retain their interest therein, with all the rights and privileges of the original members; and the administrator of his estate, or the executor under his will, shall represent such heir or heirs at the meetings (or otherwise) of said company, so as to share the burden of management; and in the event that this cannot be done, the company shall have the right to purchase the interest of such deceased member in the same manner, and for the same amount, as in the case of a member wishing to sell as before stated. Nothing in the foregoing articles is to be construed as meaning that the company is compelled to pay at the inventory price, but it simply gives the right to buy on the above-named terms if it chooses to do so; and each party to this agreement hereby grants such right and privilege to buy such retiring or deceased party's interest on above-named terms; the company reserving the right to buy at better figure and terms if they can." The complaint further alleges the adoption of a resolution, on February 17, 1882, for the discontinuance of business and the dissolution of the partnership, and due notice thereof given to defendant; also the death of one of the partners, on April 1, 1882, and the refusal of each and all of the plaintiffs to purchase the interest of the deceased partner.

Defendant demurred to the complaint on the grounds (1) that there is a defect of parties plaintiff, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed.

BERRY, J. 1. An excess of parties is not ground of demurrer as "a defect of parties," in the meaning of Gen. St. 1878, c. 66, § 92, subd. 4; *Pomeroy on Remedies*, § 206; *Richtmyer vs. Richtmyer*, 50 Barb. (N. Y.) 55; *Allen v. City of Buffalo*, 38 N. Y. 280; *Lewis v. Williams*, 3 Minn. 95 (151).

2. Three members of a partnership firm and the heirs of a deceased fourth bring this action against the remaining member, for the purpose (1) of having the partnership adjudged dissolved; (2) of having the partnership wound up, and, to that end, an accounting had, a receiver appointed, its assets converted, its debts paid, and the rights of the partners among themselves ascertained and adjusted.

In the absence of previous agreement to the contrary, the death of a partner works a total dissolution of a partnership; that is to say, a dissolution both as respects the deceased and the surviving partners: *Pollack on Partnership*, § 183; *Collyer on Partnership*, §§ 103, 106; *Story on Partnership*, §§ 317, 319 a; *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Roberts v. Kelsey*, 38 Mich. 602; *I Lindley on Partnership*, 231. A simple provision in the articles for the continuance of

the partnership for a fixed period, as, in the present instance, for thirty years, is not such an agreement: Collyer on Partnership, §§ 100, 105; Crawford v. Hamilton, 3 Madd. 251; Crosbie v. Guion, 23 Beav. 518; Story on Partnership, § 319, a. Mining partnerships appear to be governed by somewhat different rules: Jones v. Clark, 42 Cal. 180.

In case of such dissolution, the right of surviving partners and of the representative—of a deceased partner to have the partnership wound up, and any surplus property distributed, is matter of course; 1 Collyer on Partnership, § 107.

In the case of bar the partnership was dissolved by the death of the partner Hoard. The articles contain no stipulation for the continuance of the business of the concern, except upon specified contingencies, none of which have occurred, and none of which, therefore, cut any material figure in the case. It follows that the three partners plaintiff can maintain this action against the partner who refuses to recognize the dissolution, and to co-operate in closing up and adjusting the business of the concern. As respects their right to maintain it, it is not important that the heirs of the fourth partner, who are joined with them as plaintiffs, have alleged no facts to show that they are proper parties to the action, nor that the executor or administrator of the deceased is not joined; for no objection, as respects parties, have been taken, except that there is a defect of parties on account of the joinder of the heirs, and this we have disposed of.

Order affirmed.

CONTINUANCE OF PARTNERSHIP AFTER DEATH OF ONE OF THE PARTNERS

JONES V. WALKER

103 U. S. 444, 26 L. Ed. 404 (1880)

W. H. Walker, who was a large dealer in liquors, in partnership with his son Frederick, made his will in July, 1870. One of the clauses of the will provided for the continuance of the partnership and the conduct of this business after his death.

It is in this language:

"It is my wish that my son Frederick carry on the business of W. H. Walker & Co. in that name and style, and in my storehouse where it is now carried on, giving him power to change the place, until my youngest child living to be twenty-one years of age arrives at that age, or for a shorter time, if he does not find it profitable. To that end all my capital and interest in said concern shall be continued

therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable while Frederick carries on said business; my share shall pay the salary of an efficient man to aid him therein or he shall have compensation for his services as to and from my share. Agents and employes of the concern are to be paid by it. Frederick is not to be charged with \$5,000 advanced by me to him on his coming of age, and he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in said concern and its good will as will make his share equal to one-half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared in the first of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants, and others. As my personalty is to be divided among them when my youngest child living to be twenty-one years of age arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the business, my interest in the concern and its good will shall be sold as my executors may direct, and the proceeds divided, as the profits thereof are to be divided, with an obligation, if possible, that the business may be carried on under the old name and style."

The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt by the proper court.

The appellant Jones was made assignee, and very shortly afterward filed the bill in the present case against the devisees of W. H. Walker's will.

MILLER, J. (After stating the facts as above.) The object of the bill is twofold, namely, to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator.

In the recent case of *Smith v. Ayre*, 101 U. S. 320, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that, unless he had expressly placed the while, or some part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See also *Burwell v. Mandeville*, 2 How. (U.

S.) 560; *Ex parte Garland*, 10 Ves. Jr. 110. In the case before us the testator declares, in express terms, that his capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable.

We see no reason in the present case for departing from the principle adopted in *Smith v. Ayre*, after much consideration.

If dividends of profits out of the partnership business were honestly and fairly made, and when paid did not diminish the capital, nor withdraw what was necessary to pay the indebtedness of the concern, we see no reason why the persons receiving them should now be called on to refund them.

The will of the testator has a clause authorizing these dividends. The partnership had a long time to run and a large part of his capital was engaged in the business. There were children to be reared and educated, and it would have been very unreasonable that all the profits should be continually converted into capital, and that neither these children, nor Frederick, the other partner, should be permitted to receive dividends of profits, except on the condition of a liability to that extent for any future transactions of the partnership through a period of fifteen or twenty years.

If these dividends had not been declared in good faith, nor really earned, if they had diminished the capital, or if, when they were made, debts existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to these creditors to the extent of the money so received.

But we are satisfied that none of these conditions existed.

The case is mainly one of fact, and the testimony is very full. We do not think its discussion here profitable or useful. We are satisfied that at the time the last dividend was made the capital of the company was undiminished, and the firm amply able to pay its debts. Its misfortunes followed after this.

It very fully appears that the insolvency was brought about by accommodation indorsements for others, made after the last dividend was paid; that the firm, but for this, would have remained solvent, and that, in regard to this, none of the defendants were to blame except Frederick, who, being a full partner, is liable personally for all the debts of the firm.

An important matter in the case is a stipulation of the parties to the suit that all the debts owing by the firm were contracted subsequently to the declaration and payment of all the dividends, and none of the debts of the firm were in existence at the time these profits were declared and paid.

No creditor whose debt was in existence when these dividends were made was injured. All the debts then existing have been paid. What right had subsequent creditors to reclaim these dividends, who had no interest in the matter when they were paid? These defendants, except Frederick, were not partners. Their money was in the concern, and they received dividends instead of interest.

We repeat that there is no evidence of fraud or intentional wrong. Decree affirmed.

DISPOSITION OF PARTNERSHIP REAL ESTATE

SHANKS V. KLEIN

104 U. S. 18, 26 L. Ed. 635 (1881)

This bill in chancery filed by John A. Klein and others against David C. Shanks, executor of the last will and testament of Joseph H. Johnston.

The substance of the bill is that in the life time of Johnston there existed between him and Shepperd Brown a partnership, the style of which was Brown & Johnston; that their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking house; that they had branches and connections with other men in business at other places, among which was New Orleans; that they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war; that this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business; and that early in the war, namely, in 1863, Johnston died in the State of Virginia, where he then resided, leaving a will by which all his property, including his interest in the partnership, became vested in Shanks, who was appointed his executor.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war—the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. Finding that suits had been commenced by creditors of the firm against him as a surviving partner, and, in some instances, attachments levied, he became satisfied that unless he adopted some mode of disposing of the partnership property and applying its proceeds to the payment of the debts in their just order, the

whole would be wasted or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he executed a deed conveying all the property of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, and providing that the surplus, if any, should be for the use of the partners and their heirs or devisees. Klein accepted the trust, and pursuant thereto paid debts with the lands, or with the proceeds of the sale of them.

There is an allegation that Shanks, while acting as executor, and about the time the deed of trust was made, had an interview with Brown, and, being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case the record establishes that Brown acted in good faith, and did the best that could be done for the creditors of the partnership and for those interested in its property.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted actions of ejectment against them. They thereupon filed this bill to enjoin him from further prosecuting the actions, and compel him to convey the legal title to the real estate which came to him by the will of his testator. A decree was rendered in conformity with the prayer of the bill, and Shanks appealed.

MILLER, J. (After stating the facts as above). Being satisfied, as already stated, of the fairness and honesty of the proceedings of Brown and Klein and of the purchasers from them, and waiving as of no consequence, in regard to the principal point in the case, the allegation of Shanks' concurrence in or ratification of Brown's action, we proceed to consider the question as to the power or authority of Brown, the surviving partner, to bind Shanks by the conveyance to Klein, and by the sales thereunder made.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant that the equity of the creditors of the partnership to have their debts paid out of this property is superior to that of the devisee, Johnston. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of that title.

Counsel for the appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, had, for the purpose of paying the debts of the partnership, power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, that the trust deed which he made to Klein was effectual for that purpose, and that by Klein's sales to the other appellees they became invested with this equitable title and the right to compel Shanks to convey the legal title.

One of the learned counsel for the appellant concedes that at the present day the doctrine of the English court of chancery "extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partnership real estate is in fact in all cases, and to all intents and purposes, personalty." He maintains, however, that the principle has not been carried so far in the courts of America; that the extent of the doctrine is that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions; and that the right of the surviving partner, and of the creditors through him, is no more than a lien, which cannot be asserted by a sale, as if the property were personal, but to the enforcement of which a resort to a court of equity is necessary.

We think that the error which lies at the foundation of this argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word, for if it be alien in any sense it is also something more.

It is an equitable right accompanied by an equitable title. It is an interest in the property which courts of chancery will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court

of chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American courts is on the same side of the question.

In the case of *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697, that eminent jurist, Chief Justice Shaw, while using the word "lien" in reference to the rights now in controversy, asks, "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest indirectly in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq., § 1253), upon the property itself; but on the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly diverted to the private use of the parties. Suppose this trust is not implied, what would be the conditions of the parties?" etc. "But treating it as a trust, the rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien.

In *Delmonico v. Guillaume*, 2 Sandf. (N. Y.) Ch. 366, where the precise question arose which we have in the present case, the vice-chancellor held that "Peter A. Delmonico, as the surviving partner became entitled to the Brooklyn farm, and as between himself and the heir of John he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate."

In so deciding he followed the English authorities, and cited *Fereday v. Wightwick*, 1 Russ. & M. 45; *Phillips v. Phillips*, 1 Myl. & K. 649; *Broom v. Broom*, 3 lb. 443; *Cookson v. Cookson*, 8 Sim. 529; *Townshend v. Devaynes*, 11 lb. 498, note.

In *Andrews' Heirs v. Brown's Adm'r* 21 Ala. 437, the Supreme Court said that, "inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of pay-

ing the debts and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts and the survivor is charged with his duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it."

In *Depuy v. Leavenworth*, 17 Cal. 262, Chief Justice Field, in the name of the court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands—whether in the individual name of the copartner, or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be held to be one which should be governed by the decisions of the courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit or deny, the result would still be the same.

In one of the earliest cases on that subject in the high court of errors and appeals of that state, *Markham v. Merritt*, 8 Miss. 437, 40 Am. Dec. 76, Chief Justice Sharkey, in delivering the opinion of the court, concurs in the general doctrine that "when the land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, or in denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of the opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston.

Decree affirmed.

MARSHALLING OF ASSETS

RODGERS v. MERANDA

7 Ohio St. 180 (1857)

The original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record, that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of his individual creditors, in proportion to the amount of their respective demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities, in full. At the date of his failure and assignment, he was a partner with John W. Dever, in a mercantile firm, under the name and style of Dever & Murray; which firm had also become insolvent, and likewise Dever; and the firm had made an assignment of the partnership property and assets, about the same time, to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs, the partnership creditors, although they had filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claimed the right to be admitted to a participation in the dividends of the separate estate of Murray, *pari passu* with his individual creditors; while the latter denied the right, and insisted that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appeared further, that Murray, besides advancing his part of the capital of the firm, also loaned money to the firm a large amount, for which he held the obligation of the firm, which obligation, by the assignment of Murray, came into the hands of the plaintiff, who presented the same to the assignee of the firm, and claimed to have the same paid out of the assets of the firm, *pari passu* with the other partnership debts. The other creditors resisted this, and plaintiff asked an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The court below sustained the demurrer, and gave judgment in favor of the defendants. And this petition in error is filed to review and reverse that judgment.

BARTLEY, C. J. Two questions are presented for determination in this case. 1. The first is, whether in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid

out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects; so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm; and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts; and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund, after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility: 3 Kent. Com. 65. And again others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively, which has been thus benefited by their transactions; *McCulloch v. Dashiell*, 1 Harr. & Gill (Md.) 96, 18 Am. Dec. 271. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm; and also, those who contract with a partner, in his separate capacity, place reliance on his various resources or means, whether individual or joint. And inasmuch as individual

debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What then is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor, in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the very question is, whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of a partner is a rule of equality, does not still rid the subject of difficulty. For leaving the rule to stand, which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors, is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and for the purposes of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens, that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive share in the surplus of the separate estate of each of the several partners, after the payment of the separate creditors of each. It is a rule of equity, that where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that, and no other to depend on. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark

their all, or the chief part of their property, in it; and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them, which the separate creditors have not; they can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid eighty per cent on their debts, out of the joint fund, to come in *pari passu* with the individual creditors of one of the partners, whose separate property will not pay twenty per cent to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property. And that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results, as a principle of equity, from preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but the one.

It has been argued that partnership contracts are several as well as joint, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right of partnership creditors against the separate property of individual partners in proceedings at law, is not in controversy. The question here relates to the relative equitable rights of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights to an equitable adjustment in marshalling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for

near a century and a half. We find it distinctly recognized in the case of *Ex parte Crowder*, 2 Vernon 706, decided in 1715. And in *Ex parte Cook*, 2 Peere Williams 500, Lord Chancellor King declared it settled as a rule of convenience in bankruptcy that joint creditors should be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate after paying the joint creditors, the share of each partner should be distributed to his separate creditors, and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord Hardwicke followed the same rule, in *Ex parte Hunter*, 1 Atkins 228. But it appears that in *Ex parte Hodgson*, 2 Bro. ch. c., decided in 1785, Lord Thurlow made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu* with the separate creditors. This ruling of Lord Thurlow appears to have had reference to proceedings at law, and in bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction on the order in bankruptcy. But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord Loughborough, in *Ex parte Elton*, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the case of *Hodgson* was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order, and secure the application of the separate estate to the satisfaction of the separate debts; and although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom, until the amount of his distribution in the joint fund could be ascertained, and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, put an end to the assertion, which has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this, he said: "If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy, but upon general equity, that the joint estate is applicable to partnership debts, and the separate estate to the separate

debts." Again, in speaking of the inconvenience of Lord Thurlow's rule, he said, "What I order here to-day, sitting in bankruptcy, I shall forbid to-morrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. The plain rule of distribution is that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed."

Lord Eldon, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor: *Gray v. Chiswell*, 9 Ves. 118; *Dutton v. Morrison*, 17 Ves. 194, 207. And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy, in England, is a mistake; it was long and well settled as a rule of equity, before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until the statute of 6 Geo. IV. c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the courts of the several states in this country.

In Pennsylvania the rule was discarded, by a majority of the court, in the case of *Bell v. Newman*, 5 Serg. & R. 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property; and that, then, the balance of the separate property should be divided pro rata among both classes of creditors. This was placed partly on the ground of equity, and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge Gibson, however, dissenting, insisting forcibly on the rule adopted in England, as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice Tilghman remarked, in the opinion in the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of *Sperry's Estate*, 1 Ashmead (Pa.) 347, did not directly affect the question, inasmuch as it came fully within the exception, that

where there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the court in that state, in *Walker v. Eyth*, 25 Pa. St. 216, where the court express the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors, and the separate estate to the separate creditors." But the question was not directly decided, the decision of the case being put upon another ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania: 1 *Amer. Leading Cases*, 483.

In Virginia the question was presented in 1848, in the case of *Morris's Adm'r v. Morris's Adm'r*, 4 Grattan 293, and was elaborately discussed on both sides, but the court was equally divided on the question of the adoption of the rule as a general rule of equity, and the decision of the case was put on other grounds.

In New Jersey, in the case of *Wisham v. Lippincott*, 19 N. J. Eq. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687, the rule was discarded as a principle of equity, with this qualification, that the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a pro rata distribution out of his separate estate.

It does not appear that the doctrine of the English courts on this subject was ever adopted as a rule of equity by the courts in Massachusetts; but it is said that a statute was enacted in that state, in 1838, providing, as a rule for the distribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors, and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321; and also in Mississippi, in the case of *Dahlgren v. Duncan*, 7 Sm. & M. 280; but adopted in Alabama in *Bridge v. McCullough*, 27 Ala. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom;" *Jackson v. Cornell*, 1.

Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor Kent, in *Murray v. Murray*, 5 John. (N. Y.) Ch. 60, and, upon full consideration, adopted as a rule of equity, by Chancellor Walworth, in *Wilder v. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *Payne v. Matthews*, 6 Paige 19, 29 Am. Dec. 738; *Hutchinson v. Smith*, 7 Id. 26.

The same doctrine was adopted by Chancellor Desaussure, in South Carolina, as early as 1811, in *Woddrop v. Ward*, 3 Des. Eq. 203; and also by the Supreme Court of New Hampshire, in *Jarvis v. Brooks*, 23 N. H. 136.

The subject was very fully reviewed in the Court of Appeals of Maryland, in *McCulloh v. Dashiell*, 1 Harr. & Gill 96, 18 Am. Dec. 271 wherein it was settled in that State that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in the distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in *Murrill v. Neill*, 8 How. 414. And it has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of equity.

Story in his work on Partnership, ch. 15, § 365 and 366, says: "This principle of equity jurisprudence, that the joint creditors shall be entitled to a priority of payment out of the joint effects, and the separate creditors to a like priority out of the separate effects, before the other class of creditors shall be entitled to any portion of the surplus, is not, perhaps, under all its aspects, so purely artificial, as it has sometimes been suggested to be; at least, it has been often relied upon, as the dictate of natural justice."

It is true, the same author, in §77, of his same work, qualifies this opinion as follows:

"This rule, although now firmly established, 'stands as much, if not more, upon the general ground of authority, and the maxim, *stare decisis*, than upon the ground of any equitable reasoning,' and further, that 'After the repeated doubts which have been expressed upon the subject by the most eminent judges, it is not, perhaps, too much to say that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence.'" And he adds:

"Such as it is, however, it is for the public repose that it should be left undisturbed, as it may not be easy to substitute any other rule, which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations."

Kent, in his Commentaries, 3 vol., 65, says: "The joint creditors have the primary claim upon the joint fund in the distribution of the

assets of bankrupts or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied."

It is argued, however, that this doctrine was overruled in Ohio, in the case of *Grosvenor v. Austin*, 6 Ohio Rep. 104, 25 Am. Dec. 743. It is true, that the reasoning of the court in the opinion is to that effect; but the case decided falls within one of the acknowledged exceptions to the rule. Where the partnership has become insolvent, and there are no partnership assets for distribution, and no living solvent partner, it has been uniformly conceded that the principle of the rule does not apply. The case of *Grosvenor v. Austin* was a bill in equity by the creditors of the firm of Seymour Austin & Calvin Austin, for a distributive share with the individual creditors of Seymour Austin out of the assets of his separate estate in the hands of his administrator. There were no partnership assets, and both parties had died insolvent. This was not a case, therefore, for the application of the principle under consideration, and Judge Lane, in delivering the opinion, says, as to this rule: "This Court are of opinion, that if any such rule exist, it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books, except the one in *9 Vesey*, and the *South Carolina case*, that touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy," etc. Touching the subject of this obiter opinion, the following remarks of the Supreme Court of the United States, in *Murrill v. Neill*, *supra*, are in point:

"The rule in equity governing the administration of insolvent part-

nerships is one of familiar acceptance and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety."

It has been argued that the statute in this State, relative to the equal distribution of the estates of deceased persons, and also the statute providing that all assignments of property in contemplation of insolvency, giving preferences to creditors, had established, in this State, a policy inconsistent with the rule in question. These statutes were certainly never intended to have such an effect. The equality required by them is subordinate to the settled equities and priorities of different grades and classes of creditors. It was manifestly not the design of these statutes to change the nature of partnership contracts, and abrogate the preference of partnership creditors in the distribution of the partnership assets. And as this was not done, the rule of equality adopted in equity, requires the corresponding preference to be given to the individual creditors of each partner in his separate estate.

2. The remaining matter for determination, in this case involves the inquiry, whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a pro rata distribution with the partnership creditors, out of the joint fund. It is claimed that the liability of the firm to a partner for money loaned is a partnership debt, and that the individual creditors of that partner are, in equity, entitled to an equal distribution therefor, out of the partnership property. On the other hand, it is claimed that as each partner is individually liable for the debts of the firm, and as no partner can be allowed to participate with his own creditors in the distribution of a fund, the separate cred-

itors of a partner, as they can only claim through the rights of their debtor, cannot be allowed such participation with the joint creditors.

It was at one time held to be the law, on the authority of adjudications by Lord Talbot and Lord Hardwicke, that if a partner has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case, the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money lent; and that, in the latter case, the partnership creditors would be entitled to payment to the same extent, out of the individual estate of the partner. *Ex parte Hunter*, 1 Atk. 223; *Story on Part.*, § 390. But this doctrine has long since been overruled; and the contrary appears now to be well settled. In *Ex parte Lodge*, 1 Ves. Jr. 166, Lord Thurlow held that the assignees on behalf of the joint estate could not be entitled to distribution out of the separate estate of Lodge, for money which he had abstracted from the partnership, unless he had taken it with a fraudulent intent to augment his separate estate. And in *Ex parte Harris*, 2 Ves. and Beam. 210, 212, Lord Eldon said: "There has long been an end of the law which prevailed in the time of Lord Hardwicke, whose opinion appears to have been that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other, in each case. That has been put an end to, among other principles, upon this certainly, that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so, if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case no proof to affect the creditors though the individual partners may certainly have the right against each other."

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects where there are conflicting claims; and that, inasmuch as an individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership but also of himself; therefore the separate creditors of a partner could not enforce any claim to a distributive share

of the joint effects against the partnership creditors, which could not have been enforced by the partner himself for his own benefit. Story on Partnership, §390. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency, to be received with this important limitation, that it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate estate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the common pleas reversed; and ordered that the separate effects of Peter Murray be distributed pro rata first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray; and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, for money loaned by him to the firm.

All of the other justices concurred.

RIGHT OF A PARTNER TO AN INJUNCTION AND THE APPOINTMENT OF A RECEIVER

NEW V. WRIGHT

44 Miss. 202 (1870)

PEYTON, C. J. It appears from the record in this case that Charles B. New and Charles A. Wright, on the 13th day of July, 1865, formed a partnership in the mill and lumber business, for the terms of five years from that date.

The bill of complaint of Charles B. New, filed in the Chancery Court of Jefferson County, on the 19th day of March, 1869, states that he was possessed of a large tract of land in said county of Jefferson, commonly called his "Buena Vista" plantation, on which was a great number of cypress trees, well suited and valuable for the purpose of being sawed into lumber, and that on said tract there was a valuable site for a saw-mill, convenient to said cypress timber, and to the Mississippi River, for shipping lumber from such mill site, and that on said place he had

material and machinery suitable for the construction of a saw-mill in part. That by the terms of said partnership, the said Charles A. Wright was to use the cypress timber on said tract of land, for the said term of five years, to such an extent as might be necessary to carry on the saw-mill and lumber business, and to dispose of the same according to the terms of the contract of partnership; that complainant was to allow said Wright, the use of the machinery then on said place as part of the machinery of said saw-mill, to be erected by said Wright, on said mill site, as soon as was practicable, and he was to place therein circular saws, and also machinery necessary and usual for the purpose of sawing lumber, personally to superintend the construction of said mill, the arrangement of the machinery, the hiring of laborers, and to defray all expenses incurred in the building of the mill, the purchase of machinery, wages of laborers, and all other expenses incident to the running of the said mill, and for which the complainant was not in any way to be responsible. But one-half of the sum thus expended in the construction of the mill, the purchase of the machinery, and the hire of labor by the said Wright is to be paid him, and one-half of the machinery, other property and labor furnished by complainant, to be paid to him out of the proceeds of the first sales of lumber, sawed in said mill, and when such payments were so made to the said parties, the mill and machinery should be the joint property of the complainant and said Wright, who was to continue to run the mill, and the profits resulting therefrom to be equally divided between them; that complainant was not to be liable for any of the debts contracted by said Wright, in the purchase of machinery, hiring of labor, running the mill, or in any other manner whatever.

The bill states that complainant was in part paid for his half of the machinery, materials and labor furnished by him in the erection of said mill, and that said Wright was also paid his entire half of the outlay in the purchase and erection of machinery, labor and materials in building said mill. And when these several outlays were paid to complainant and said Wright out of the proceeds of the sales of the first lumber sawed, the said mill was to be run by the said Wright as their joint property, at his sole expense, and that complainant was entitled to one-half of the proceeds of the lumber sold; that by the terms of the partnership the complainant's capital, to wit: the millsite and cypress timber were to be set-off against the services of said Wright and expenses of running said mill and selling the lumber made thereat, for which complainant was to be in no manner bound, and that he is entitled to one-half of the proceeds of all the lumber sawed by the said mill, and sold by the said Wright, and to one-half of the lumber remaining unsold; and notwithstanding said mill has been constantly engaged in sawing lumber ever

since the same went into operation until the present time, and is still engaged in sawing, and large quantities of lumber sawed therein have been sent to market, and sold by said Wright, the money therefor received by him, and that he is still engaged in sawing and selling the lumber, the products of the said mill, he has hitherto wholly failed to account with complainant for his share of the products of said mill, or of the proceeds of the sales of said lumber, or to pay one cent thereof to complainant, except as before stated, as part of the one-half interest of the complainant in the machinery, labor and materials furnished in the erection of said mill; that complainant has in vain sought a settlement of his share of the said proceeds with the said Wright, who pretends that the expenses of running said mill consumed all the proceeds of the sales of the lumber, and that more money is paid for the running of said mill, in outlay for labor and other pretended charges and expenses, than the amount of the sales of lumber sawed by said mill, and in excess of such proceeds of lumber, to the sum of several thousand dollars; that there is due complainant, as his share of the proceeds of the lumber sold from said mill by said Wright, a large sum of money, subject to no abatement for expenses incurred by said Wright in running said mill, and the precise amount of which can only be ascertained by referring the whole matter to a master or commissioner of the Court to take and state an account of the sum due complainant; that neither party, in entering into the partnership, contemplated any other use of the said mill than to the cypress timber on said tract of land on which it was erected, and the sawing of no other timber on any other tract of land or grown elsewhere; and the said Wright in violation of the contract of partnership, and without the consent of complainant, has ceased to procure cypress timber from the said "Buena Vista" tract of land of the complainant for the use of said saw-mill thereon, and has been for some time heretofore, and now is procuring other cypress timber from other persons to saw, and is sawing the same into lumber on said mill, and thereby defeating one of the objects the complainant had in view in entering into the partnership, to wit: to turn his own cypress timber into productive capital; and that such provision justifies a dissolution of the partnership, and winding up the business thereof.

The bill further charges that said Wright, upon a fair settlement of said business, will be found in debt to complainant in an amount so large that he will not be able to pay the same, unless the stock of timber now on hand at said mill or elsewhere belonging to the said Wright, procured from others, and lumber on hand in which he has half interest, and the interest he has in said mill, would be sufficient to pay and satisfy such indebtedness, and which complainant does not believe, and that he is

in danger of losing a portion of what is due him. He therefore prays for an injunction to restrain the said Wright and his agents from removing any saw logs, cypress, or lumber belonging to said firm, or to the said Wright, out of the jurisdiction of the Court or from said saw-mill, or from selling the same or any part thereof, and that a receiver be appointed to take charge of said business, and that on the final hearing, an account be taken and stated between complainant and said Wright, and if, upon the coming in of said account and the confirmation thereof, the said Wright be found indebted to the complainant, that a decree be made for the payment thereof, and for a seizure and sale of the interest of the said Wright in the said saw-mill, stock, timber, and lumber thereunto appertaining, to an amount sufficient to pay and satisfy said debt, and that said partnership be dissolved and its affairs wound up under the orders of the Court.

On the 29th day of March, 1869, the defendant moved the Court to dissolve the injunction which had been granted in this case on the following grounds: 1st. Because there is no equity upon the face of the bill; 2d. Because no legal bond has been given in this case; 3d. Because the penalty in said bond is wholly insufficient and the surety therein is insolvent. This motion was sustained by the Court without stating upon what ground, and the injunction dissolved. And at the same term of the Court the complainant moved for the appointment of a receiver, which motion was overruled by the Court; and from these decrees of the Court in dissolving the injunction and overruling the motion for the appointment of a receiver, the complainant appeals to this Court.

It appears from the affidavit of Wright, that the usual sawing of said mill per day in the best running season was at least six thousand feet; and from his testimony upon the hearing of said motions, that since the mill went into operation in September, 1865, he had sold lumber to an amount between twenty and twenty-three thousand dollars, and that the expenses of running the mill were about thirty thousand dollars, and that he had not bought any timber or saw logs himself, but his wife did buy some saw logs and lumber.

The propriety of the action of the Court in dissolving the injunction is impeached by the appellant, and presents the first question for our consideration. The bill of complaint charges that neither party contemplated any use of the said mill than to saw the cypress timber on the complainant's said tract of land, on which the mill was erected, and for the sawing of no other timber, and that the said defendant, in disregard of the terms of the partnership, and without the consent of the complainant, has ceased to procure cypress timber from the said tract of land of the complainant, for the use of the saw-mill thereon, and has been for

some time heretofore, and now is, procuring other cypress from other persons to saw, and is sawing the same into lumber on said mill, and thereby defeating one of the objects the complainant had in view in entering into the partnership, and that object was to turn his own cypress timber into productive capital. And this allegation is to some extent, corroborated by the evidence of the appellee, who testified that his wife bought saw logs and timber. This was using the mill in a manner unauthorized by the terms of the contract of partnership, and would justify an injunction, and together with the loss of seven thousand dollars in running the mill for more than three years, would perhaps authorize a dissolution of the partnership. The injunction, therefore, could not have been properly dissolved for the want of equity on the face of the bill. But it must be conceded that the bond given on obtaining the injunction was clearly insufficient, yet the Court should have given reasonable time to the appellant to make a new bond, and upon his failure to do so, within the time appointed, the injunction should be dissolved: Rev. Code, 548, art. 58. We think the Court erred in thus dissolving the injunction without giving time to make a new bond.

The remaining question for our decision is, did the Court err in overruling the motion for the appointment of a receiver? "It must be admitted," said the master of the rolls, in *Madgwith v. Winkle*, 6 Beavan, 495, "that when an application is made for a receiver in partnership cases, the Court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership, at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties."

In order to justify the dissolution of a partnership, on the ground of misconduct, abuse, or ill-faith of one of the parties, it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith, but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent, or the injury already accomplished: *Story on Partnership*, 464, par. 288. Where a concern of any character or kind, covering a partnership, is broken up by controversial suits, and it is apparent that there can be no agreement between the parties in interest for its continuance, a receiver will be appointed: *Williams v. Wilson*, 4 Sandf. Chan, 379; *Edwards on Receivers*, 330.

And a dissolution of a partnership may be granted and a receiver appointed on account of the gross misconduct of one or more of the parties: 1 Story's Eq. 635, par. 672, a. To authorize the appointment of a receiver there must be some breach of the duty of a partner, or of the contract of partnership: *Harding v. Glover*, 18 Ves. 281.

It was the duty of the appellee to take the timber used at the mill, from the tract of land on which it was erected, belonging to the appellant; and the getting timber elsewhere, as alleged in the bill of complaint, was a breach of that duty and of the contract of partnership. And if the mill sawed six thousand feet of lumber per day, and the running of the mill from the fall of 1865 to the commencement of this suit in the spring of 1869, brings the parties in debt seven thousand dollars, as stated by the appellee in his testimony, it would seem to be a business which neither party should desire to continue.

Upon the whole, we are of opinion that the case made by the bill authorizes the appointment of a receiver, and that, therefore, the Court erred in overruling the application therefor.

For the reasons herein stated, the decrees of the Court in dissolving the injunction and overruling the motion for the appointment of a receiver, will be reversed; and the cause remanded for further proceedings in accordance with this opinion, with leave to the appellee to answer the bill within sixty days from this date.

INDORSEMENT BY PARTNERS

ESTABROOK V. SMITH

See under Bills and Notes, page 222

PRESENTMENT TO PARTNERS

FOURTH NATIONAL BANK V. HEUSCHEN, ET AL.

See under Bills and Notes, page 224

CORPORATIONS

NATURE OF A CORPORATION

BUTTON V. HOFFMAN

61 Wis. 20, 20 N. W. 67 (1884)

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In his instructions to the jury the learned judge of the circuit court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There is no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and became the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged

in the corporate identity. Ang. & A. Corp. Paragraphs 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Id. paragraph 557. The corporation is the trustee for the management of the property, and the stockholders are the mere cestui que trust. Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 4 Amer. Corp. Cas. 350.

The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp., paragraph 191; Pope v. Brandon, 2 Stew. (Ala.) 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3 Mees. & W. 422; Waltham Bank v. Waltham, 10 Metc. 334; Tippets v. Walker, 4 Mass. 595. The corporation holds its property only for purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp., paragraph 160, 190, 557; Hyatt v. Allen, 4 Amer. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp., paragraph 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property, and do its business in his own name. While the corporation exist he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own

benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in *City of Utica v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner," and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no right legal title to its property or profits until a division is made." In *Winona & St. P. Railroad Co. v. St. Paul S. C. Railroad Co.*, 23 Min. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interests in its rights, property and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, S. C. 1 N. W. Rep. 261, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen (Mass.), 62, an action of replevin was brought by A. B., and C., as the "trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A. B., and C., trustees as aforesaid," became bound, and the officer, in his return, certified that he had taken a bond "from the within named A., B., and C., "and the property was receipted by "A., B., and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v. Assessors*, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. Bank*, 11 Paige, 118, it was held that, although a corporation as deemed to have surrendered its charter for non-user, it was not dissolved, and would not until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. American Art Union*, 5 Sandf. Super. Ct. 614, it was held that, "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant,

as a shareholder in the art union, for an injunction against a certain disposition of its property, was denied, because it had no interest in it. See, also, *Goodwin v. Hardy*, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham*, 32 Wis. 146; *Sensenbrenner v. Mathews*, 48 Wis. 250; S. C. 3 N. W. Rep. 599. In analogy to the above principle it was held in *Murphy v. Hanrahan*, 50 Wis. 485, S. C. 7 N. W. Rep. 436, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CORPORATIONS AND JOINT STOCK COMPANIES

LIVERPOOL INSURANCE COMPANY V. MASSACHUSETTS

10 Wall. (U. S.) 566 (1870)

The State of Massachusetts, claiming of the plaintiff in error a tax of four per cent on the premiums received in the course of its business in that state, obtained a decree in her courts enjoining the company from further prosecution of its business, until the taxes found to be due were paid. The law of Massachusetts under which this tax was assessed, enacts that "Each fire, marine, and fire and marine, insurance company incorporated or associated under the laws of any government or state other than one of the United States, shall annually pay to the Treasurer of the Commonwealth a tax of four per cent, upon all premiums charged or received on contracts made in this Commonwealth for insurance of property."

The case is brought to this court on the ground that in its application to the plaintiff in error, the statute of Massachusetts is in conflict

with the provision of the Constitution which confers on Congress the right to regulate commerce with foreign nations and among the states, and with that which secures to the citizen of each state all the privileges and immunities of citizens in the several states.

Assuming that the plaintiff in error is not a corporation, but is a partnership or association of individuals, some of which are subjects of Great Britain, and others citizens of the State of New York, it is argued that the rights of the former are protected by the treaty between the United States and Great Britain, and the rights of the latter by section 2, article 4, of the Federal Constitution above referred to.

The company was originally formed by a "deed of settlement."

This instrument, as far as it could be done without the aid of Parliament established a company under the name of The Liverpool Life and Fire Insurance Company, with a capital of 2,000,000 pounds which was divided into one hundred thousand shares of 20 pounds each, and declared its purpose to be, making insurance on life and against fire. These shares could be sold and transferred, and executors and administrators represented them in the company on the death of the owner. If, by the laws of the association, a share became forfeited, the owner was released from all further liability to the company. The business of the company was to be conducted by a board of directors, exclusively, and they could make by-laws and change and modify them. There was a covenant that suits might be brought by or against the company in the names of one or more directors, which should bind the stockholders, and that no stockholder would plead in abatement the nonjoinder of the others; and it was further covenanted that a judgment so obtained against a director might be made out of the property of any of the stockholders. Numerous other provisions are found in the original articles, which consisted of over a hundred sections, but only those are referred to here which bear on the question we are considering. There were also three subsequent deeds of settlement, and three Acts of Parliament were passed to give efficiency to the purposes of the Association.

The first of these Acts provided that the association might sue and be sued in the name of the chairman or deputy chairman of the board of directors; that the stockholders might sue the company as plaintiffs, or be sued by it as defendants. It regulated the manner in which the shareholders might be made individually liable for the debts of the association; and it declared that the Act should not be construed to incorporate the company or relieve its members from their individual liability, except as provided in the Act.

The second Act of Parliament changed the name of the company to that which it now bears, and authorized it to make contracts by the

new name; and it also contained a provision that the Act should not make the company a corporation; and there was a third Act which authorized amalgamation with another company, and which again provides against its being construed into an Act of incorporation or a limited liability partnership.

MR. JUSTICE MILLER. The case of *Paul v. Virginia*, 8 Wall. 168, decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one state, having an agency by which it conducted the business in another state, was not engaged in commerce between the states.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and that a corporation created by a state could exercise none of the functions or privileges conferred by its charter in any other state of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the Acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the Act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights and liabilities of corporations, their essential nature and character, and their relation to the

business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance, etc., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the states of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the states of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the states the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the Acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So, also, it is said that the fact that there is no provision either in the deed of settlement or the Act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an Act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several Acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these Acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is, whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that state on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

Judgment affirmed.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the states from imposing taxes or license laws upon either British corporations or joint stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other states have chosen to take some of their shares.

RATIFICATION BY CORPORATION OF ACTS PERFORMED
IN ITS BEHALF BEFORE ORGANIZATION

McARTHUR V. TIMES PRINTING COMPANY

48 Minn. 319, 31 Am. St. Rep. 653 (1892)

Action by D. A. McArthur against the Times Printing Company to recover damages for a breach of contract. Judgment for plaintiff. Defendant appeals.

MITCHELL, J. The complaint alleges that about October 1, 1889 the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in a procuring the organization of the defendant company to publish a newspaper; that, about September 12, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1,—the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16, but that the publication of the paper was commenced by the promoters October 1, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193; *Beach, Corp.* Par. 198. This, however, seems to be more a question of name than of substance; that is, whether the

liability of the corporation, in such cases is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be express, but it may be inferred from acts or acquiescence on the part of the corporation, or its authorized agents, as any similar original contract might be shown. *Battelle v. Pavement Co.*, 37 Minn. 89. See, also, *Mor. Corp. Par.* 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and none which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12,—the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification" yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. In *re Empress Eng. Co.*, 16 Ch. Div. 128; *Melhado v. Railway Co.*, L. R. 9 C. P. 505;

Kelner v. Baxter, L. R. 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of a variance between it and the complaint. The assignments of error are very numerous, but what has already been said covers all that are entitled to any special notice.

Order affirmed.

CORPORATE CHARTER A CONTRACT WITH THE STATE

DARTMOUTH COLLEGE CASE V. WOODWARD.

4 Wheaton (U. S.) 518 (1819)

See under Contracts, page 137

CHARTER AS A CONTRACT LICENSE

STONE V. MISSISSIPPI

101 U. S. 814 (1879)

MR. CHIEF JUSTICE WAITE: It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sec. 10. The doctrine in the *Trustees of Dartmouth College v. Woodward*, 4 Wheat 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Consti-

tution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has, in fact, been entered into, and if so, what its obligations are.

In the present case the question is, whether the State of Mississippi, in its sovereign capacity, did, by the charter now under consideration, bind itself irrevocably by a contract to permit "The Mississippi Agricultural, Educational and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holders thereof to" "any lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful," "awarded to them" "by the casting of lot, chance or otherwise." There can be no dispute but that, under this form of words, the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that, in consideration thereof, the company paid into the State treasury \$5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1,000 and "One half of one per cent on the amount of receipts derived from the sale of certificates or tickets." If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures to allow the corporation to continue its corporate business during the while term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists therefore, or not, depends upon the authority of the Legislature to bind the State and the people of the State in that way.

All agree that the Legislature cannot bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501. Neither can it be denied

that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen v. Virginia*, 8 How. 163 168, that "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that, with the same opportunities of indulgence, the same results would be manifested.

If lotteries are to be tolerated at all, it is, no doubt better, that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever suppressed and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the Provisional Government of that State, in 1867, at the close of the late civil war, the present Act of incorporation, with more of like character, was passed. The next year, 1868, the people in adopting a new Constitution with a view to the resumption of their political rights as one of the United States, provided that "The Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sec. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. Rev. St., sec. 3894; 19 Stat. at L. 90 sec. 2.

The question is, therefore, directly presented, whether, in view of these facts, the Legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it

cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Co. v. Massachusetts*, *supra*.

In *Trustees of Dartmouth College v. Woodward*, 4 Wheat, 518, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a state, would, unnecessarily and unwisely, embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is, in general, necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government, dependent on taxation for support, can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discre-

tion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of a speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record, and the judgment is affirmed.

CONTROL OF STATE OVER FOREIGN CORPORATIONS

PAUL V. STATE OF VIRGINIA

8 Wallace (U. S.) 168 (1868)

Error to the Supreme Court of Appeals of the State of Virginia. The case was thus:

An act of the legislature of Virginia, passed on the 3d of February, 1866, provided that no insurance company, not incorporated under the

laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. The bonds to be deposited were to consist of six per cent. bonds of the State, or bonds of individuals, residents of the State, executed for money lent or debts contracted after the passage of the act, bearing not less than six per cent. per annum interest.

A subsequent act passed during the same month declared that no person should, "without a license authorized by a law, act as agent for any foreign insurance company," under a penalty of not less than \$50 nor exceeding \$500 for each offence; and that every person offering to issue, or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Samuel Paul, a resident of the State of Virginia, was appointed the agent of several insurance companies, incorporated in the State of New York, to carry on the general business of insurance against fire; and in pursuance of the law of Virginia, he filed with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license to act as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the treasurer of the State, and the production to the officer of the treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone the license was refused. Notwithstanding this refusal he undertook to act in the State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted, and convicted in the Circuit Court of the city of Petersburg, and was sentenced to pay a fine of fifty dollars. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case was brought to this court under the 25th section of the Judiciary Act, the ground of the writ of error being that the judgment below was against a right set up under that clause of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" and that clause giving to Congress power "to regulate commerce with foreign nations, and among the several States."

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States," the same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of *The Hope Insurance Company v. Boardman*, where the company was described in the declaration as "a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the Constitution.

In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the State in which the corporation was created, and where alone it had any legal existence, without any special averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court.

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. In *Bank of Augusta v. Earle*, the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other States, was entitled to the benefit of that provision, and that the court should look beyond the act of incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other States, reference being made to an early decision upon the right of corporations to litigate in the Federal courts in support of the position. But the court, after expressing approval of the decision referred to, observed that the decision was confined in express terms to a question of jurisdiction; and the principle had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation; that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens, they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the Constitution could never have intended to give citizens of each State the privileges of citizens of the several States, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those States, that this would be to give the citizens of other States higher and greater privileges than are enjoyed by citizens of the State itself, and would deprive each State of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give such a construction to the article in question. Whenever a corporation makes a contract

it is the contract of the legal entity, the artificial being created, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State."

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insured to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Indeed, without some provisions of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, "It must dwell in the place of its creation, and can not migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where

the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course, that such assent may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in *Bank of*

Augusta v. Earle," upon any sound principle, to give such a construction to the article in question"—a construction which would lead to results like these.

We proceed to the sound objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which required, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are complete by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia would constitute a portion of such commerce.

In *Nathan v. Louisiana*, this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the

purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation.

"In determining," said the court, "on the nature and effect of a contract, we look to the *lex loci* where it was made, or where it was to be performed. And the bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court." And again: "For the purposes of revenue the Federal Government has taxed bills of exchange foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress be a tax on the commerce of a State."

If foreign bills of exchange may thus be the subject of State regulation, much more so may contracts of insurance against loss by fire.

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be affirmed.

ISSUE OF SHARES FOR LESS THAN PAR

SOUTHWORTH V. MORGAN

205 N. Y. 293, 98 N.E. 490 (1912)

COLLIN, J. The plaintiff, trustee of the bankrupt corporation, Remington Automobile & Motor Company, seeks to recover from the defendant a sum unpaid, upon a subscription by the defendant for two shares of the capital stock of the corporation.

The trial court found as facts: The bankrupt was organized in 1900 under the laws of New Jersey. Its authorized capital stock was \$250,000, divided into 2,500 shares of the par value of \$100 each. Soon after its incorporation, the board of directors adopted a resolution as follows: "Resolved, that for the purpose of securing a local interest in the Remington Automobile & Motor Company on the part of the citizens of Ilion (N. Y.) that 200 shares of the stock be issued, to be sold at \$25 per share, and that the proceeds of such sale be placed in the treasury, to be used for regular expenses." Thereafter, in pursuance of the resolution, the general manager and secretary of the corporation presented to the defendant a writing, which contained the agreements that the plant of the corporation was to be located and its business to be carried on at Ilion, and that the defendant would purchase two nonassessable shares of the capital stock of the corporation at \$25 for each share and no more would ever have to be paid upon them. The defendant signed the agreement and purchased the two shares of stock upon the distinct understanding and agreement made between the defendant and the general manager and secretary of the corporation that \$25 per share fully paid for the stock. He paid \$50 for the two shares of stock at the time he received them. The corporation located its plant at Utica, N. Y., and not at Ilion. In December, 1902, the company was adjudged a bankrupt, and in April, 1906 the United States District Court granted an order directing a call or assessment upon the defendant and others of \$75 per share to meet the deficiency in the assets of said corporation to meet the obligations of its creditors, said assessments to be paid on or before July 1, 1906, and the defendant was duly served with a copy of said order. The court found as a conclusion of law that the plaintiff was entitled to recover the sum of \$150, a conclusion which the facts found do not support.

The liability of the defendant is to be determined by the law of the state of New Jersey. That state, through its laws, gave the corporation its existence, powers, liabilities, and the limits within which it was free to act, and a citizen of this state, who became a shareholder in it, entered into contract relations, the extent and obligation of which depended upon the laws, in so far as they do not violate a statute or the settled public policy of this state. *Lowry v. Inman*, 46 N. Y. 119; *Hancock National Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; *Malson's Bank v. Boardman*, 47 Hun. 135.

The relevant laws of New Jersey are not disclosed or laid before us by the printed record; nor do the findings make known the provisions of the charter of the bankrupt other than that stated relating to the authorized capital stock. We are confined to the case as the record pre-

sents it. The laws of other states are facts which must be alleged and proved and of which we cannot take judicial notice either in their language or their interpretation. *Genet v. Del. & Hud. Canal Co.*, 163 N. Y. 173, 177, 57 N. E. 297; *Hancock National Bank v. Ellis*, 166 Mass. 414, 44 N. E. 345, 55 Am. St. Rep. 414.

In the absence of those facts, we must presume that the common law of New Jersey is the same as the common law of New York. *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. 516, 522.

It is urged by the respondent, at this point, that the order of the United States District Court directing the assessment of the shares of the defendant conclusively determined the validity and the amount of the assessment. It is true that the regularity and validity of the proceeding in that court and its conclusions cannot be attacked in this action; but the existence or nonexistence of an obligation on the part of the defendant to pay the assessment was not within the subject-matter of which that court took jurisdiction. To enable the plaintiff to enforce the liability of the delinquent shareholders to the extent only which the deficiency in the corporate assets required and to affect parity of contribution between them, it was necessary that an account of the assets and debts, of the entire amount of the capital remaining unpaid upon the issued shares, and the part of the face value of his shares unpaid by each stockholder, should be taken, and the aggregate assessment required equitably rated by the court, and it is upon those issues that its order is beyond attack in this action. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725. In the former case the court, speaking of an analogous order of a court of Illinois said: "But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract." 162 U. S., page 337, 16 Sup. Ct., page 813, 40 L. Ed. 986. The respondent does not contend that the charter provision dividing the authorized capital stock into shares "of the par value of \$100 each" prohibited the creation of an actual share or interest upon a consideration less than \$100 or secure to the creditors or their representative the right of collecting upon each share, as the discharge of the corporate debts demands, the difference between the consideration and \$100.

Inasmuch as no statute of the state of New Jersey, nor provision of the charter of the corporation relative to the liability of the defendant,

was proven, we turn to the common law, remarking parenthetically, however, that we have not been referred to and have not found any domestic statute which prescribes, as a condition to the exercise here of the rights derived from the state of New Jersey that the shareholders shall be liable to the creditors or their representative up to the nominal value of their stock, and there is therefore no statutory, as there is no charter, prohibition against the issuance of the shares of the capital stock for less than their par value as named in the charter, and no statutory mandate that the shares shall be deemed issued and held subject to the payment of such value. Nor do the principles of the common law of this state work such results. In *Christensen v. Eno*, 106 N. Y. 97, 102, 12 N. E. 648, 650 (60 Am. Rep. 429), the action was brought by a judgment creditor of an insolvent corporation organized under the laws of Illinois to recover 40 per cent. of the authorized par value of \$100 each of 25 shares of the stock of the company issued to but unsubscribed for by the defendant, upon which the 40 per cent. was not paid, but, as a gratuity, was credited as paid, when the stock was issued. Judge Andrews, writing for this court, which reversed the judgment in favor of the plaintiff, said (citing authorities): "But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract." The principles which determined our judgment in that case were reaffirmed in *Christensen v. Colby*, 110 N. Y. 660, 18 N. E. 480.

In the case at bar, no statute supports the alleged liability of the defendant, and the express agreement between the corporation and the defendant was that the defendant should pay 25 per cent. of the nominal value of the shares and no more. The respondent contends, however, and therein he has been successful in the courts below, that the creditors of the corporation represented by the plaintiff have the right to compel the payment of the unpaid 75 per cent. because the capital stock is a trust fund for the security of the creditors, and that a liability in their favor to the extent of the unpaid part of the nominal value of the actual shares exists and can be enforced. Such contention availed the plaintiff in the *Christensen* case until it reached this court, the General Term saying therein that the practical effect of the transaction was to take out of the assets, to which the creditors were entitled, the 40 per cent. indorsed as paid upon the stock, when in fact it was not paid. It is strenuously urged that this case is not controlled by the principles which

decided the Christensen Case, for the reason that the defendant subscribed for the two shares of the capital stock, while in the Christensen Case the stock certificate was merely issued to and accepted by the defendant. The subscription, as expressed in the agreement between the defendant and the corporation, has been completely fulfilled by the payment in full of the sum it bound him to contribute and therewith his liability to the corporation or the creditors terminated, unless there issued from the trust fund doctrine, through implication, a contract which, in the paramountcy given it by the fact that it was the irresistible product of the law, nullified the expressed stipulation that \$25 was the whole sum to be paid upon each share, and substituted in its place the requirement that, as to the creditors, there should be paid \$100, or so much thereof as the satisfaction of their demands made necessary. That doctrine has not such potency. Its peculiar vigor is that, contrary to the common law of England, it secures to the creditors of insolvent corporations or their representatives the right of enforcing subscriptions for shares of which the corporation has deprived itself by release or defeasance. It declares that the capital stock of a corporation is a substitute for the personal liability which subsists in individual or partnership undertakings, and is a fund set apart as a security for the payment of the corporate debts. The capital or capital stock which it thus segregates is not the capital stock authorized or named in the charter of the corporation. If it were, the members would be bound by the doctrine to contribute on account of it the sum within its named value needed to pay the debts of the insolvent corporation. The statement in the charter does not create a security for the creditors. It creates authorized or potential capital stock and shares which, transferred into actual shares through the acquisition of subscribing members and their payments, produces the money or property which, put into a single corporate fund, is the actual capital stock on which the business is undertaken and the assets or fund contemplated by the trust fund doctrine which the directors or stockholders may not lawfully diminish by appropriating or squandering it or giving it away. And as there is not a fund or security in the nominal or potential shares, there is none in the excess of the nominal value over the subscribed value of the shares. The subscription agreements, as they are enforceable through their express provisions or implication or statutory conditions, are the sources and the measure of the duty of the subscribers. *Christensen v. Eno*. 106 N. Y. 97, 12 N. E. 211. The doctrine further declares that unpaid subscriptions are a part of the capital and that a subscriber cannot be discharged to the injury of creditors by arrangement of device to which creditors do not give their assent and by which he is to pay less than his subscrip-

tion. *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; *Hazard v. Wight*, 201 N. Y. 399, 94 N. E. 855. The doctrine does not create or nullify subscriptions. It lays hold of the assets of an insolvent corporation, and in doing that it compels subscribers to fulfill their legal obligations and perform their legal duties; but it does not beget those duties or obligations; it does not make unlawful or invalid a subscription which, apart from it, was valid and lawful. The question with it is: Has the subscriber fully performed the subscription agreement as it in fact and in law exists? And an affirmative finding renders it inapplicable and inoperative. In the case at bar there were not statutory conditions upon which the shares might be owned. The agreement between the defendant and the corporation expressed with completeness the obligations and liability of the defendant for his shares. He has fulfilled the obligation and thereby destroyed the liability. The trust fund doctrine is inapplicable, and the findings of fact do not constitute a cause of action.

We have not considered or determined either the manner or the extent in which a statute of New Jersey, inimical to the express agreement of the corporation and the defendant, would through implication affect it, or the effect of the statement of the corporation that it would locate its plant and carry on its business at Ilion, because the record submitted to us does not present those questions.

The judgment should be reversed, and a new trial granted; costs to abide the event.

Haight, Vann, Willard Bartlett, Hiscock, and Chase, JJ., concur.

CULLEN, C. J. I concur on the sole ground that, as shown in the opinion of Collin, J., the question involved in the appeal is settled by the authority of the previous decisions of this court. Were it an original one, I should reach a contrary conclusion.

Judgment reversed, etc.

WHO MAY TAKE ADVANTAGE OF ULTRA VIRES ACTS?

HUBBARD V. WORCESTER ART MUSEUM

194 Mass. 280 (1907)

KNOWLTON, C. J. This is a petition brought by the heirs of Stephen Salisbury, late of Worcester, deceased, for leave to file an information in the nature of a quo warranto against the respondent, under the R. L. c. 192, §§ 6-13. The Worcester Art Museum is a corporation, established under the provisions of the Pub. Sts. c. 115 (R. L. c. 125),

"for the purpose," as set forth in its certificate of incorporation, "of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal, and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." By the will of Mr. Salisbury this corporation is made his residuary legatee, and if the intention of the testator is carried out, it will receive under the will, real and personal estate amounting in value to between \$2,000,000 and \$3,500,000. By the R. L. c. 125, § 8, such corporations are authorized to "hold real and personal estate to an amount not exceeding one million five hundred thousand dollars." By the St. 1906, c. 312, enacted after the probate of the will, the right of this respondent to hold real and personal estate was enlarged to an amount not exceeding \$5,000,000. The petitioners contend that, by reason of the limitation in the statute, the gift is void; that, as heirs at law of the testator, their rights in this part of his estate became vested on the probate of the will; that the St. 1906 is prospective in its operation, and does not affect the right of the respondent to hold property under this will, and that, if it were construed as applying to property devised by this will, it would be unconstitutional and void.

The statute under which the petition is brought has been considered in *Goddard v. Smithett*, 3 Gray, 116, in *Hartnett v. Plumbers' Supply Association*, 169 Mass. 229, and in other cases. We will assume in favor of the petitioners, without deciding, that if they were right in their view of the questions of substantive law involved, it would be available to give them the remedy which they seek. We came directly to the effect of the residuary clause in the will.

The attack upon its validity may be considered from two points of view: first, in reference to the rights of testators, as against their heirs, to dispose of their property for charitable or other purposes; secondly, in reference to the provisions of the law giving this kind of corporation a right to hold property to an amount not exceeding a certain sum.

From the first point of view this gift is perfect and complete. Except for the protection of the statutory rights of a husband or wife, the power of a testator in this Commonwealth to dispose of his estate by a will is unlimited. There is nothing in our law to restrain one from giving free course to his charitable inclinations, up to the last moment of his pos-

session of a sound, disposing mind. Making charitable gifts in this Commonwealth is not against public policy, and we have no legislation, such as has long existed in England and in New York and some of the other American states, putting obstacles in the way of such testamentary acts. The only ground of objection to this part of the will is not from the point of view of the testator or of his heirs, but on account of the provision of the statute regulating the rights of corporations as to the holding of property. We must, therefore, determine the meaning and effect of this statute on which the petitioners rely.

They contend that it is by implication an absolute prohibition against the holding, at any time, in any form, for any purpose, of a greater amount of property than that stated, and that any attempt of a corporation to hold more, or of any person to put more into the ownership of a corporation, is illegal and absolutely void. The respondent contends that this implied limitation of the right to hold is made on grounds of public policy; that it is a provision only in favor of the State, which the State may enforce or not, as it chooses; that grants or devises in excess of the amounts stated are not void, but only voidable; that third persons cannot question the validity of such grants or devises, but that they are legal so long as the State leaves them undisturbed, and that the State may at any time, by a legislative act or in some other proper way, completely waive its right of enforcement.

In interpreting the act the history of earlier kindred provisions may be helpful. At common law, corporations were authorized to acquire and hold both real and personal property without limit. In *re McGraw's estate*, 111 N. Y. 66, 84, "The creation of a corporation gives to it, amongst other powers, as incident to its existence, and without any express grant of such powers, that of buying and selling." *Bank v. Poitiaux*, 3 Rand. 136. "A corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose." *Leazure v. Hillegas*, 7 S. & R. 313. See also *Page v. Heineberg*, 40 Vt. 81; *Mallett v. Simpson*, 94 N. C. 37, 41.

Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the Middle Ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III, c. 36, and which have continued with various modifications to this day. See 7 Edw. I, c. 2; 15 Rich. II, c. 5; *Shelford on Mortmain*, 2, 6, 8, 16, 25, 34, 39, 809, 812; *Tyssen on Charitable Bequests*, 2, 383. Under these acts the alienations were

not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture, which gave a right to the mesne lord and the king to enter after due inquest. This right to enter was often waived by a license in mortmain. See citations above, and Tyssen on Charitable Bequests, 383; St. 7 & 8 Will. III, c. 37. In form these licenses commonly authorized a holding of property "not exceeding" a certain value. In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations. Shelford on Mortmain, 55. See also pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.

Another act, St. 9 Geo. II, c. 36, which is usually called "The Mortmain Act," but is called by Tyssen the "Georgian Mortmain Act," is of a very different nature. One of its purposes, as declared in the preamble, is to avoid "improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Considered in reference to its purposes, it is not properly called a mortmain act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

We never have had any real mortmain acts in Massachusetts. The nearest approach to one was the Prov. St. 1754-55, c. 12; 3 Prov. Laws (State ed.), 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding three hundred pounds a year, and provided that they should be made by deed, three months before death, and that all bequests, devises, or later grants should be void. This statute related only gifts to deacons, and was repealed by St. 1785, c. 51 (February 20, 1786), which reenacted a part of the law, but omitted the provision that gifts not authorized by the act should be void. *Bartlet v. King*, 12 Mass. 537, 545. See R. L. c. 37, § 1.

The significance of this reference to English law and to our legislation is, first, that, except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations, or providing that any kind of conveyances, devises, or bequests, to corporations shall be void. On the other hand, the policy of the Commonwealth, as expressed both by legislation and the decisions of its courts, has been exceedingly liberal to testators and public charities. *Sanderson v. White*, 18 Pick. 328, 333, 334; *American Academy v. Harvard College*, 12 Gray, 582, 595, 596; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 539, 550. Secondly, the implied limitations upon the power of corporations to hold property, which

appear in numerous enactments, have been made, not in the interest of grantors or devisors or their heirs, but in the interest of the State, on considerations of public policy. The general form of these limitations, which appears in the statute before us, and with slight variations in special charters (a list of which, two hundred and seventy-four in number, granted in this State before 1850, has been furnished us through the industry of counsel) corresponds with the form of licenses granted by the Crown of England under the old mortmain acts, and sometimes embodied in charters granted by Parliament. Under these English acts, grants or devises to a corporation to hold property without a license, or in excess of the amount licensed, were not void, but only voidable by the mesne lord or the king, upon entry, after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength that the implied limitations in our statutes were intended to have no greater force than the old mortmain acts of England, as distinguished from the Georgian mortmain act.

We start with the inherent right, already referred to, of every corporation to take and hold property at common law, by virtue of the act of its creation. This right is recognized in our statute by implication, without express mention. R. L. c. 109, §§ 4-6. What force is to be given to the words, "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars?" The respondent contends that their meaning is as if words were added as follows: "and beyond that amount it shall have no right as against the Commonwealth; and the Commonwealth may take proper measures, through action of the Attorney-General or otherwise, to prevent or terminate such larger holding." According to the argument, a taking and holding by a corporation, above the prescribed amount, is under its inherent right. As between it and the State as the guardian of the public interest, a provision as to amount is made, which does not affect its right as to third persons. As to the general legality of the holding, except when the State chooses to enforce the law for its own benefit, the condition is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyance to aliens. Such conveyances whether by grant or devise, were good against every one but the State, and could be set aside only after office found. *Fox v. Southack* 12 Mass. 143; *Waugh v. Riley*, 8 Met. 290; *Judd v. Lawrence*, 1 Cush. 531; *Kershaw v. Kelsey*, 100 Mass. 561.

That this is the effect of such limitations in statutes of this kind where the title of the corporation is under a grant, as distinguished from a devise, seems to be the universal rule. *Vidal v. Girard*, 2 How. 127,

191; *Runyan v. Coster*, 14 Pet. 122; *National Bank v. Matthews*, 98 U. S. 621; *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622; *National Bank v. Whitney*, 103 U. S. 99; *Fritts v. Palmer*, 132 U. S. 282; *Leazure v. Hillegas*, 7 S. & R. 313; *Chambers v. St. Louis*, 29 Mo. 543; *Bank v. Poitiaux*, 3 Rand. (Va.) 136; *Fayette Land Co. v. Louisville & Nashville Railroad*, 93 Va. 274; *Mallett v. Simpson*, 94 N. C. 37; *Gilbert v. Hole*, 2 So. Dak. 164; *Barrow v. Nashville & Charlotte Turnpike Co.*, 9 Humph. 304; *Hough v. Cook County Land Co.*, 73 Ill. 23; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 117 Ill. 237; *Hamsher v. Hamsher*, 132 Ill. 273; *Baker v. Neff*, 73 Ind. 68, 70. This is a fair deduction from the decisions in this Commonwealth. *Heard v. Talbot*, 7 Gray, 113; *Commonwealth v. Wilder*, 127 Mass. 1, 6; *Davis v. Old Colony Railroad*, 131 Mass. 258, 273; *West Springfield v. West Springfield Aqueduct Co.*, 167 Mass. 128; *Slater Woollen Co. v. Lamb*, 143 Mass. 420; *Prescott National Bank v. Butler*, 157 Mass. 548; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Atlas National Bank v. Savery*, 127 Mass. 75; *Bowditch v. New England Ins. Co.*, 141 Mass. 292; *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

The counsel for one of the petitioners says in his brief, "It is fully conceded at the outset that where a corporation takes and holds property by conveyance, or by executed gift inter vivos, contrary to its charter rights, no one but the State can complain. This is settled by a practically unbroken line of decisions in all the states," etc.

But if the statute were a prohibition that renders the holding utterly void, and the taking also void, as is argued in the opinion in *In re McGraw's estate*, 111 N. Y. 66, anybody interested could take advantage of the violation of law, unless he was precluded by estoppel. Most of the cases which we have cited do not put their decision on the ground of estoppel. The ground on which most of the cases go is that the implication is not an absolute prohibition, but only a condition affecting the rights of the corporation as between it and the State. If the holding were an illegality which was utterly void, the condition would be the same whether the taking was by grant or devise, and a variety of unfortunate consequences might follow. The property might greatly increase in value after its acquisition, as was the case in *Evangelical Baptist Society v. Boston*, 192 Mass. 412. In that case, although the property of the corporation largely exceeded in value the amount authorized by the statute, there was no intimation that the holding was illegal, so long as the State did not interfere. See also *Humbert v. Trinity Church*, 24 Wend. 587, 605. As to all interests of private per-

sons, in the absence of interference by the State, the cases generally treat titles to property held by corporations in excess of the specially authorized amounts as good. They allow the corporations to give good titles to purchasers of such property.

Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

The decisions upon the precise point at issue are conflicting. In *Jones v. Habersham*, 107 U. S. 174, a case similar to that now before us, it was held by the court, in an opinion by Mr. Justice Gray, that "restrictions imposed by the charter of a corporation upon the amount of property that it may hold, cannot be taken advantage of collaterally by private persons." In the same case in the Circuit Court the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley of the Supreme Court of the United States, which is found in 3 Woods, 443, 475. The same rule is established in Maryland. *Hanson v. Little Sisters of the Poor*, 79 Md. 434; *In re Stickney's will*, 85 Md. 79, 104. *DeCamp v. Dobbins*, 2 Stew. (N. J.) 36, 40, was decided by the Chancellor on this ground. The decree was affirmed on another ground in the Court of Errors and Appeals, 4 Stew. (N. J.) 671, 690, in an opinion by Beasley, C.J., which contains a dictum disapproving of the view of the Chancellor. In *Farrington v. Putnam*, 90 Maine, 405, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The same doctrine is stated in *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, 801; s. c., 134 Fed. Rep. 513, 527. It is also stated in text books. *Beach, Corp.* (Purdy's ed.) § 825; *Thompson, Corp.* §§ 5795, 5797.

The leading case which presents the opposite view is *In re McGraw's estate*, 111 N. Y. 66. Although the decision necessarily puts a construction upon a statute of that State, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion, "We have a decided mortmain policy. It is found in our statute in relation to wills, pro-

hibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise." In *Chamberlain v. Chamberlain*, 43 N. Y. 424, the court refers to the prohibition of devises, and to the N. Y. St. 1860, c. 360, still in force, which makes void all bequests or devises to charity in excess of one half of testator's property, where he leaves relatives. Other statutes have been passed, limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities, by a person leaving relatives, of more than one fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator. Gen. Laws. of N. Y. 1901 (Heyd. ed.), 4885, 4891, 4892. The policy of that State in regard to charities has been very unfavorable. See *Allen v. Stevens*, 161 N. Y. 122, 139, 140; *People v. Powers*, 147 N. Y. 104; *Fosdick v. Hempstead*, 125 N. Y. 581.

The doctrine of the New York court is stated as the law in *Davidson College v. Chambers*, 3 Jones Eq. 253, and adopted in *Wood v. Hammond*, 16 R. I. 98, 115, and *House of Mercy v. Davidson*, 90 Tex. 529. In the case in North Carolina the decision was by two of the three judges of the court, the Chief Justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw case in New York, but in terms that do not leave the grounds of their decisions entirely clear. *Cromie v. Louisville Orphans' Home Society*, 3 Bush, 365, 383; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 686. In reference to supposed errors in the opinion in the last case, see *Pritchard on Wills*, § 153, note, and *Farrington v. Putnam*, 90 Maine, 405, 433.

In the construction of our statute, when the question arises whether a different rule shall be established in regard to the taking and holding by a corporation under a will from that which is universally laid down in regard to a holding under a deed, we are much influenced by the Policy of our law as to devises and bequests for charitable purposes. We are of opinion that, under the R. L. c. 125, § 8, a gift to a corporation under a will, to an amount in excess of the sum specially authorized, should be held no less valid than a similar acquisition of title under a deed. It is good as against every one but the Commonwealth. It follows that the St. 1906, c. 312, operated as a waiver of the Commonwealth's right to terminate the holding, and a legislative declaration of the entire validity of the provision in the will.

If we are wrong in this conclusion, the petition must be dismissed on an independent ground. The gift was to a public charity. The purposes of the Worcester Art Museum, as set forth in the agreement for its organization from which we have quoted, show the charitable

uses to which all property held by it must be put. It is all held "solely in trust, for the benefit of all the people of the city of Worcester." We have no doubt that the property was given under the testator's will with a general charitable intent, with which the Worcester Art Museum, as a corporation, had no other connection than as an instrument to carry out the general purpose of the testator. In other words, the gift was not to the Worcester Art Museum as a corporation, apart from the charitable work in which it was engaged, nor on account of anything essential or peculiar in its performance of the charitable work described in its instrument of organization. The general charitable purpose was predominant in the mind of the testator, and not a desire to give to a particular corporation. The charitable purpose may be implied in the name or object of the devisee. *Winslow v. Cummings*, 3 Cush, 358; *Bliss v. American Bible Society*, 2 Allen, 334; *Incorporated Society v. Richards*, 1 Dr. & War. 258, 331. The object of the devisee, as a legally established public charity may arise "from the character of the body to which the gift is made, or from publicly avowed purposes of its organization and action." *Old South Society v. Crocker*, 119 Mass. 1, 24; *Stratton v. Physio-Medical College*, 149 Mass. 505, 508. In such a case, if for any reason the donee named is incapable of executing the trust, the court will not allow the gift to fail for want of a donee. *Fellows v. Mainer*, 119 Mass, 541; *Codman v. Brigham*, 187 Mass. 309; *Osgood v. Rogers*, 186 Mass. 238; *Bliss v. American Bible Society*, 2 Allen, 334; *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349; *Winslow v. Cummings*, 3 Cush, 358; *Attorney-General v. Stephens*, 3 Myl. & K. 347; *Hayter v. Trego*, 5 Russ. 113; *Loscombe v. Wintringham*, 13 Beav. 87; *Swasey v. American Bible Society*, 57 Maine, 523; *Almy v. Jones*, 17 R. I. 265.

If the corporation, at the time of the probate of the will, was incapable of taking the property and carrying out the general charitable intent of the testator, the court, applying the doctrine of cy pres, would appoint a trustee to act in its place. Inasmuch as the Legislature, by the St. 1906, c. 312, has removed the only ground of its disability, a direction to turn over the property to the corporation would accomplish perfectly the purpose of the testator. *Baker v. Clarke Institution for Deaf Mutes*, 110 Mass. 88.

In no view of the case have the petitioners any private right or interest which has been injured by the respondent, such as brings them within the provisions of R. L. c. 192, § 6.

Petition dismissed.

SPECIAL ACT—ACCEPTANCE OF CHARTER

STATE V. DAWSON

16 Ind. 40 (1861)

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in January, 1849, the legislature of the State of Indiana enacted a special charter of incorporation (which is set out at length) for a railroad from Fort Wayne, Indiana, to Jeffersonville, to be called the Fort Wayne and Southern Railroad; that the persons named in the charter as directors did not accept said charter till June 2, 1852, when they did meet and accept the same and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present constitution of Indiana took effect on November 1, 1851. It contains these provisions;

"All laws now in force and not inconsistent with this Constitution shall remain in force until they shall expire or be repealed." Sched. (1 subsec.) of Const.

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Art. 11, paragraph 13.

"All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same." Sched. *supra*, subsec. 4.

The charter for the Fort Wayne and Southern Railroad was not a charter for municipal purposes, and hence was not specially continued in existence. Art. 11, paragraph 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz.: acceptance of the charter enacted.

Says Grant, in his work on Corporations, vide p. 13, "Nor can a charter be forced on any body of persons who do not choose to accept

it." And again at, page 18, he says, "The fundamental rule is this: No charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. *Bagg's Case*, 2 Brownl. & G. 100; s. c. 1. Roll. Rep. 224; *Dr. Askew's Case*, 4 Burr. 2200; *Rutter v. Chapman*, 8 M. & W. 25; per *Wilmont, J.*, *Rex V. Vice-Chancellor of Cambridge*, 3 Burr. 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. *Townson v. Tickell*, 3 B. & Ald. 31." See, also, Ang. & Am. paragraph 83, where it is said if a charter is granted to those who did not apply for it, the grant is said to be in fieri till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the state; a consent that the persons named in the charter might become a corporation might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the state, in 1849, was withdrawn by the state, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851, and it could be created afterwards only by the concurrent consent of the state and the corporators. But at that date, the constitution prohibited both the state and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the United States in *Aspinwall v. Daviess County*, 22 How. 364; where it was held that the new constitution prohibited a subscription of stock to the Ohio and Mississippi Railroad Company, authorized by the charter of the corporation, granted under the former constitution, and actually voted by the people of the county under that constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old constitution, must be determined on a trial of the cause below.

Had the provision in our constitution, like that on this subject in the constitution of Ohio, ordained that the legislature should "pass no special act conferring corporate powers," the restraint would clearly

have been imposed alone upon future legislative action; but, in our constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See the State v. Roosa, 11 Ohio St. 16.

PER CURIAM. The judgment is reversed, with costs.

ESTOPPEL TO DENY CORPORATE EXISTENCE

NEWCOMB v. REED

12 Allen 362 (1866)

Contract, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before Ames, J., without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

HOAR, J. The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them; as required by St. 1855, c. 140.

The case of *Utley v. Union Tool Company*, 11 Gray, 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under St. 1851, c. 315, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies, St. 1851, c. 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and the place in which the corporation was established. The court say,

"There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank v. Boynton*, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in *Lechmere Bank v. Boynton*, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business,

contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

The defendant Brackett, who was treasurer in February 1861, appears to have been liable with the directors under the provisions of Gen. Sts. c. 60, §§ 18, 20, 31.

Exceptions sustained.

LIABILITY OF CORPORATE OFFICERS

HECKMAN'S ESTATE

172 Penn. 185 (1896)

Opinion by MR. JUSTICE WILLIAMS:

This case depends upon the inferences to be drawn from the evidence submitted to the orphans' court. The auditing judge reached one conclusion while his associates reached the opposite one, and it becomes necessary to inquire whether the evidence fairly sustains the decree made by the majority of that court. It appears that several persons, among whom were Heckman and Shafto, had arranged to organize a company for the manufacture and sale of brick. Shafto was the only one of the number who was an experienced brickmaker, and his judgment as to the preliminary arrangements, including the selection of materials and the location of the brickyard, was relied on by all his associates. He was at the same time the agent of Ward, employed by him to secure a tenant for a brickyard owned by him, with the promise that he should have one quarter of the rent obtained. Under these circumstances he directed the attention of his associates to Ward's property, proposing a lease of the yard and of the right to take the clay, to be paid for by a royalty of one dollar per thousand bricks, with a minimum royalty of twenty-five hundred dollars for the first year and four thousand per annum thereafter. Two or three of his associates, including Heckman, visited the property at his instance. The brick company had not been organized. A meeting was brought about by Shafto between Ward and his own associates in the brick enterprise, which resulted in a lease upon the terms Shafto had proposed.

Heckman was to become the president of the company when it was fully organized, and the lease was executed by him on behalf of the company then in process of formation, and as soon as the company was in condition to take it he assigned it directly to the corporation. This was done in pursuance of an understanding to which his associates,

including Shafto, the agent of the lessor, were parties. The bills were thereafter made to the Philadelphia Brick Company, presented to its officers, and paid, except in one instance, by its checks.

Under the circumstances disclosed by the evidence, we think the knowledge of Shafto was notice to his principal that the tenant of the yard and the purchaser of the clay was the corporation and not any member or officer thereof, that the corporation was the prospective operator and owner of the works, and was to be looked to for the rents or royalties. The subsequent course of dealing would indicate actual knowledge of the facts, and recognition of the relation of lessor and lessee between himself and the corporation on the part of Ward.

We are not prepared to adopt the conclusion reached by the court below, that the bad faith of Shafto in his dealings with his associates rendered the contract he had negotiated between them and his employer absolutely void. As to any right of action or interest of his own, that result might well follow; but we can see no reason why the lessor should not recover for his royalties, at least as to so much thereof as he was actually to receive. It is not necessary, however, to enter upon that subject. We place the affirmance of this judgment on the ground already indicated. The agent negotiated this lease. He knew perfectly well who was to be the lessee, and by whom the enterprise was to be conducted. He was himself a member of the company for whose use and benefit Heckman became temporarily a substitute; and it would have been a fraud on Heckman for Shafto to attempt to hold him personally responsible for what he well knew was understood to be the obligation of the corporation. The principal cannot secure the benefit of the contract and repudiate the means by which its execution was induced. He stands on the ground on which his agent has put him.

The assignments of error are overruled and the decree is affirmed.

LIABILITY OF CORPORATE OFFICER

HALE V. MASON

160 N. Y. 561 (1899)

BARTLETT, J. This action was begun by the St. Lawrence Manufacturing Company in the early part of 1891, to recover damages of the defendant, who was one of the trustees of the company, by reason of his alleged misconduct, which prevented the consummation of contracts that would have proved of great value to the company.

This corporation had its general office and factory at Gouverneur, St. Lawrence County, and its business consisted in manufacturing agri-

cultural implements, principally disc harrows and wagons and their attachments.

The transaction covered by this litigation took place principally in the year eighteen hundred and ninety.

It is established by uncontradicted evidence that the annual report of the directors to the stockholders on the 1st of January, 1890, disclosed that the capital of the company was materially impaired and during the years 1888-1889 very serious losses had been made.

In a letter that Corbin, the president of the company, addressed to the defendant on the 10th of April, 1890, he said, among other things: "I do not hesitate to tell you that the outlook is not sufficiently promising here to warrant me in spending the most valuable years of my life in trying to work out a profit for my friends. The past eight weeks has been a revelation to us all. The bottom of the disc harrow trade seems to have dropped out entirely throughout the eastern states. The market has been flooded with cheap instruments, and the agents from every establishment in the country swarm over our disc harrow district long before we could get at it, and we are going to experience great difficulty in unloading even one half of the machines that we have ready for the market."

Under these discouraging circumstances, it was discussed by the board of directors whether it would be wise to transfer the business of the corporation to some western state, where manufacturing could be conducted under more favorable conditions and the market more readily reached.

The result was that a resolution was passed April 2, 1890, appointing the president of the plaintiff company and Mr. Mason, the defendant, a committee to find the best terms that could be made for this removal.

Shortly before this, a contract had been drafted between the East Omaha Land Company and the plaintiff corporation, subject to the ratification of the stockholders of the latter, which provided in substance that the land company would donate to the manufacturing company five acres of land for the purpose of locating its business, trackage facilities connecting their factory with the Union Pacific Railroad, and money to the extent of ten thousand dollars, for the purpose of moving its plant and erecting its buildings.

While the defendant is charged with having prevented the execution of this contract, the evidence shows that the stockholders of the plaintiff never ratified the contract, and that it was voluntarily abandoned by the company for the reason that a more advantageous agreement was secured later at Minneapolis, in the State of Minnesota.

On the 23d of April, 1890, four individuals, as parties of the first part, made a contract with the plaintiff corporation, as party of the second part, which in substance provided that they would donate five acres of land for building purposes, trackage facilities from railroad to factory, and a cash bonus of thirty thousand dollars, paid in specified instalments, five thousand dollars of which was paid down at the time of the execution of the contract. This five thousand dollars was paid to Corbin, the president of the company, who conducted the Minneapolis negotiations from beginning to end.

It seems that the defendant was the owner of lands in the neighborhood of the real estate that was to be benefited by the contract with the East Omaha Land Company, and his associates in the ownership of adjacent land were of opinion that he should contribute his fair share to the bonus that was to be paid to the plaintiff company. To this the defendant made objection, and it seems to have been, to some extent, an obstacle to further negotiations. He offered to turn in, as a payment of his share of the bonus, certain lands that he owned in that locality, but his figures were deemed too high.

It also appears that he had originally made an agreement with Corbin, the president of the plaintiff company, by which he was to receive a bonus from his own company of \$3200.00 if the arrangement went through.

When the defendant was advised that the Minneapolis deal was closed he immediately wrote to Corbin, who had returned to the State of New York, that he would expect the same bonus in the Minneapolis matter that had been promised him in the Omaha contract.

Corbin replied that there was no basis for such a claim on the defendant's part, and this circumstance led to a bitter quarrel between Corbin and the defendant, which appears in the evidence, both in correspondence and personal interviews.

In substance it came to this: That the defendant Mason said that Corbin had imposed upon the Minneapolis parties by false statements as to the condition of the New York corporation, and that the deal could never go through if the Minnesota parties knew the exact truth in regard to the matter.

He further stated to Corbin that he felt it was his duty in the premises, as many of his friends in Minnesota were interested in the matter, to advise them that they had better send an expert east and look into the true condition of the plaintiff company. This he did, and an expert named Boshart was sent down to Gouverneur; but, as he seemed to be in the interest of Mason, and was not duly accredited in the estimation of the company's officers, he was refused access to the books and

factory of the corporation. He returned to Minnesota and later Corbin visited Minneapolis and had an interview with the parties who had excuted the contract with him, in which he stated that his representations were not false or fraudulent, and he trusted the contract would be carried out; that the company was ready to perform on its part.

He also stated that he was willing to pay the expenses of an expert to come east and examine the general condition of the company. Matters were held in suspension at this point, and an expert named Allen was sent to Gouverneur and spent over a week in examining the machinery and books of account of the company. Allen was an expert in the carriage manufacturing business, as well as an accountant. On his return to Minneapolis, he made a report to the parties in interest there, which was exceedingly unfavorable, and showed that Corbin's representations were not wholly trustworthy. For instance, he found figures that had been placed upon the book accounts were far too high, and that accounts that had been charged off to profit and loss were revived and put among the live assets; that the machinery account that stood at \$12,000 should be reduced to \$3500, much of the machinery being old and valueless; instead of a thousand wagons having been sold by the plaintiff company, he thought the number should be reduced to two hundred or two hundred and fifty, and as to the patent account covering the disc harrows, he found that licenses had been disposed of for the central states to a concern in Illinois, and the same was true of very large interests on the Pacific coast; he also found that Corbin's representations as to the value of the particular kind of wagon manufactured by the company were exaggerated, and that a steel axle, which was claimed to be a valuable feature of it, was not a practical thing from a mechanical standpoint.

Without going further into detail, he summed up that to take this eastern company would mean, practically, that they had to run it and furnish the capital to keep it going, and get no benefit of the transaction, except to dispose of certain lands in the neighborhood of the factory. He afterwards added that the real estate that Corbin had valued at \$8000 in Gouverneur only cost the company about \$4000; he also stated that he was not influenced in this report in any way by the action of the defendant.

The result of this report led to an abandonment of the Minnesota contract, the parties of the first part refusing to go on with the performance of it, on the ground that they had been deceived as to the real condition of the eastern company. A subsequent effort was made to get the parties together in a new contract, but it failed.

It was after these transactions that the company, before it passed into the hands of a receiver, who now represents this litigation on its behalf, decided to bring this action against the defendant for \$53,000, damages, by reason of having prevented the execution of these contracts.

At the close of all the evidence the defendant's counsel moved for a nonsuit on six distinct grounds, only one of which need be noticed, as the learned trial judge placed his granting of the motion on that particular ground, to wit, that there is no proof that the defendant performed any act preventing the execution of the contract, Exhibit "B," with the Minneapolis parties.

The trial judge had previously suggested that the contract with the East Omaha Land Company had been voluntarily abandoned by the plaintiff company, and that the sole issue in this case was under the Minneapolis agreement.

It must be admitted that this record is not particularly creditable, either to the president of the company or to this defendant. The former is shown to have concealed the truth in regard to this well-nigh moribund corporation, and the defendant seems willing to have done the same thing if his bonus of \$3200 had been paid him under the Minnesota contract. Nevertheless, it was due to the defendant's suggestion that the affairs of the plaintiff company were examined by the parties to the Minnesota contract.

As matter of honest business dealing the defendant performed only an obvious duty when he advised the Minnesota parties that material facts in regard to the condition of the plaintiff company had been concealed from them and, it seems perfectly clear that the report of Allen, the second expert, resulted in the abandonment of this contract, and that no act of the defendant can be regarded in law as the proximate cause of this result.

Judgment affirmed.

ACT MUST BE PERFORMED IN BEHALF OF EXISTING PERSON

IN RE NORTHUMBERLAND AVENUE HOTEL COMPANY

33 Ch. D. (C. A.) 16 (1886)

Application by Sully, as trustee of Wallis, to be admitted as a creditor in the winding up of the hotel company. Application denied. Applicant appeals.

Wallis leased grounds to one Doyle, "as trustee for and on behalf of an intended company, to be called the Northumberland Avenue

Hotel Company." The company was incorporated, accepted Doyle's contract, took possession of the premises, and paid rent to Wallis. This proceeding is for damages for breach of the contract entered into between Wallis and Doyle.

COTTON, L. J. This is an appeal from a decision of Mr. Justice Chitty in what, although in form it was a summons from chambers in a winding-up, was in substance an action for damages for breach of an agreement alleged to have been entered into between Mr. Wallis, whom the claimant represents, and the company. The first thing, therefore, that we have to see is whether in fact there was any contract between them. I am not referring to the question whether a contract was made which, in consequence of the provisions of some Act of Parliament, was incapable if being enforced, but to the question whether in fact there was any agreement between these two parties.

The company was incorporated on the 25th of July, 1882 and before that date, viz., on the 24th of July, a contract in writing was entered into between a gentleman acting as agent for and on behalf of Mr. Wallis and another gentleman, who described himself as a trustee for the company, the company, in fact, having no existence at the time. That was a contract which was binding as between Mr. Wallis and the other gentleman whom I have mentioned, and was a contract which provided that certain things should be done by the company. That contract in no way bound the company, because the company at that time was not formed. In fact it was not in terms a contract with the company, although it was a contract by a person who purported to act for the company that certain things should be done by the company. It is not contended that this contract was in any way binding on the company, nor is it disputed that the company after it was formed could not ratify the authority of the gentleman who purported to act as their trustee before they were incorporated, and who therefore could not have any authority to do so.

But it is said that we ought to hold that there was a contract entered into between the company and Wallis on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion that will not hold. It is very true that there were transactions between Wallis and the company, in which the company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into

existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis; and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that explains the whole of these transactions. The case is entirely different from those cases which have been referred to where the court finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them. We are not therefore authorized to infer a contract as it was inferred in those cases where there was no other explanation of the conduct of the parties.

In my opinion the decision of Mr. Justice Chitty was right, and the appeal must therefore fail.

LINDLEY, L. J. I am of the same opinion. The more closely the case is investigated, the more plainly does it appear that there never was any contract between the company and Wallis. The more closely the facts are looked into, the more plain is it that everything which the company did, from the taking possession down to the very last moment, was referable to the agreement of the 24th of July, 1882, which the directors erroneously supposed to be binding on the company. I therefore cannot come to any other conclusion than the conclusion at which Mr. Justice Chitty arrived.

LOPES, L. J. I am entire of the same opinion.

The question is whether there was a contract between Wallis and the company. There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the company. - But at that time the company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the company. It is also equally clear that the company, after it came into existence, could not ratify that contract, because the company was not in existence at the time the contract was made. No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of the 24th of July, 1882; and we

are asked to infer such a contract from the conduct and transactions of the company after they came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of the 24th of July was in existence, and was a binding, valid contract. Everything that was done by them after their incorporation appears to me to be based upon the assumption that the contract of the 24th of July, 1882, was an existing and binding contract. I think, therefore, that the appeal ought to be dismissed.

LIABILITY OF A CORPORATION ON AN ACCOMMODATION NOTE

MONUMENT NATIONAL BANK V. GLOBE WORKS

101 Mass. 57 (1869)

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any person taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the note which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defense cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Narragansett Bank v. Atlantic Silk Co.*, 3 Met, 282. And it was held in *Bird v. Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully

stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, everyone dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.*, 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note has virtually represented, that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it it was held in *Farmers' & Mechanics' Bank v. Empire State Stone Dressing Co.*, 5 Bosw, 275, that an accommodation acceptance

by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of ultra vires to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co., v. Hawkes*, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants.

Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

POWER OF CORPORATION TO BORROW MONEY

BRADBURY V. BOSTON CANOE CLUB

153 Mass. 77 (1891)

HOLMES, J. This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a clubhouse. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff. The money was received by the corporation, and was used by the corporation, and was used by it for the purpose mentioned. The only

question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon the land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, 2, for encouraging athletic exercises. By paragraph 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of paragraph 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See *Fay v. Noble*, 12 Cush. 1. 18; *Morville v. American Tract Society*, 123 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

Judgment for plaintiff.

ESSENTIALS OF DE FACTO CORPORATION

FINNEGAN V. KNIGHTS OF LABOR BUILDING ASSOCIATION

52 Minn. 239, 53 N. W. 1150 (1893)

GILFILLAN, C. J. Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, c. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling and leasing, of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the "Knights of Labor." The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction amounting to \$599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a

partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because—First, the act under which it attempted to become incorporated, to wit, Laws 1870, c. 29, is void, because its subject is not properly expressed in the title; second, the act does not authorize the formation of corporations for the purpose or to transact the business: stated in the articles; third, the place where the business was to be carried on, was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of *quo warranto*, in behalf of the state, for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by Selden, J., in *Methodist, etc., Church v. Pickett*, 19 N. Y. 482, as “(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law.” This statement was apparently adopted by this Court in *East Norway Church v. Froislie*, 37 Minn. 447, 35 N. W. Rep. 260; but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in *Taylor on Private Corporations* (page 145) is more nearly accurate: “When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally.” To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 34 Minn. 355, 25 N. W. Rep. 799, in which it was held that what had been done was ineffectual to limit the individual

liability of the associates. They had not gone far enough to become a de facto corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. "Color of apparent organization under some charter or enabling act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto.

The title to chapter 29 is "An act in relation to the formation of co-operative associations." Appellant's counsel argues that the body of the act does not contain a single element of co-operation," as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all the members, either by their labor or capital, or both, co-operate to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense though the precise limits are not well defined. There is no legal as distinguishable from their popular, signification. In the Century Dictionary the term "co-operative society" is defined, "A union of individuals, commonly laborers or small capitalists, formed # # # for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local but the capital stock is limited to \$50,000, the stock which one member may hold to \$1,000. No one can become a shareholder without the consent of the managers, and no one is entitled to more than one vote. The provisions in the body of the act are in accord with the title, and it is therefore not open to the objection made against it. The purposes for which, under the act corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." The main purpose of the act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving

a reasonably liberal meaning to the word "trade" in the act, it would include the buying and selling of real estate, and, upon a similar construction the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the act authorizes the corporation to "take, hold, and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing. The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*. The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

LIABILITY FOR TORTS—MALICE

GOODSPEED V. EAST HADDAM BANK

2 Conn. 530, 58 Am. Dec. 439 (1855)

CHURCH, C. J. This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground that a corporation aggregate was not, by law, liable for such a case of action as was set up by the plaintiff in his declaration at least no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private—that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," &c. (4 Serg. & Rawle, 16). To the same effect is the language of Shaw, C. J., in the case of *Thayer v. Bastan* (19 Pick. 511). He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company* (7 Wend. 31). There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possi-

bility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last century, has been in a progress of development so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations from this cause are formed, and new interests created, legal principles of a practical rather than a technical or theoretical character, must be applied.

And so, in the course of this progress, it has been. It was said by Lord Coke, "that they had no moral sense;" and from thence, or from some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or dissension; and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns, but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent are exploded in modern times, and it is believed, that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which

work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough v. Bank of Eng.*, 16 East, 6; *Beach v. Fulton Bank*, 7 Cowen, 486; *Foster v. Essex Bank*, 17 Mass. 503; *Riddle v. Proprietors of Locks and Canals*, 7 id. 187; *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & Rawle, 16; 4 Hammond, 500, 514; 10 Ohio Rep. 159; *Dater v. Truy Turnpike Co.*, 2 Hill, 630; 23 Pike. 139, 2 Bl. Com. 476; Ang. & Ames, 392; 2 Kent Com. 290; 1 Sw. Dig. 75; 15 Ohio Rep. 476; 18 id. 229. And indeed, no actions are now more frequent, in our courts than such as are brought against corporations, for torts, either in case or trespass. *Harner v. New Haven & Northampton Canal Co.*, 14 Conn. 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Cauhties Railway Co. v. Brooks*, 2 Eng. Law & Equity, 406. And it was decided long ago, that a corporation was liable to an action for a false return to a writ of mandamus, alleged to have been made falsely and maliciously. 16 East, 8; 14 Eng. Com. Law, 159; 3 Mees. & Wels. 244; Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden that corporations may be subjected to civil liabilities for torts, the acts charged as such have been the acts of their constituted authorities—either the directors, or agents, or servants, employed by them. We do not intend here to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of as vexatious was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank in its corporate capacity. The bank, by its charter and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any other officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. &

Ames, ch. 10 sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing so shows that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comstock, 470; but denied by Chief Justice Reeve in his *Domestic Relations*, 347, we think, has never been applied to such a case as this but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority—persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation—the representatives standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Barrell v. The Nahant Bank*, 2 Met. 163, Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says, "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority in the sense to which the rule applies to agents and attorneys," &c. The same principle is very distinctly recognized in the cases of *Bank Commissioners v. Bank of Buffalo*, 6 Paige's Ch. 502, and *Life and Fire Ins. Co.*, 7 Wend. 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act—and this is only in the choice of directors, and no more. Beyond this, they can only be considered as the persons for whose ultimate individual interest the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent be true; but the protection of the law in this matter is not to be confined to stockholders; the public and strangers have rights

also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be—that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that, as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right to assume it as a legal principle, that it cannot be proved. We do not know that it has ever been adjudged that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come

in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges is evidence of malice, and which must, as in this case, be proved; but, would it be endured that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason than that a corporation is only an ideal something, of which malice or intention cannot be predicated? And, if, as we have suggested, the directors are, for all practical purposes, the corporation itself, acting at least as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure that this objection of the defendants was not regarded as sufficient, nor the difficulty of proving malice upon a corporation felt, when the case of *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. R. 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion that the nonsuit granted by the superior court should be set aside, and a new trial granted.

In this opinion, Waite, J., concurred.

ILLEGAL COMBINATIONS

NORTHERN SECURITIES COMPANY V. UNITED STATES

193 U. S. 197 (1903)

MR. JUSTICE HARLAN. Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern

Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their stock in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who deliver their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in one ownership. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the cer-

tificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise. . . . in restraint of commerce among the several states or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust"; but if not, it is a combination in restraint of interstate and international commerce; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute menace to, and restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said,—all the judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

* * * * *

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a

transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of both these (constituent companies) into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of custodian, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States v. Joint Traffic Association*) "smothering competition between the lines of two railway carriers."

MR. JUSTICE BREWER, concurring. I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Freight Association*, 166 U. S. 290, followed by the cases of *United States v. Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, and *Montague & Co. v. Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was levelled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be

upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act, is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company; and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, which by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instru-

mentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

RIGHT OF A STOCKHOLDER TO OBJECT TO AN INCREASE IN THE CAPITAL STOCK OF A CORPORATION

CHICAGO CITY RAILWAY COMPANY V. ALLERTON

18 Wallace (U. S.) 233 (1873)

Appeal from the Circuit Court for the northern district of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from \$1,250,000 to \$1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:—

“No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days’ public notice in such manner as may be provided by law.”

He also relied on an act of the legislature of Illinois, passed March 26, 1872, to execute and carry out the above provision of the constitution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders’ meeting.

The railway company, in its answer, relied upon its charter, granted February 14th, 1859, the third and fourth sections of which were as follows:

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court decreed in favor of the complainant and the company took the present appeal.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder pro rata, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concern.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.

WHEN THE STOCKHOLDERS APPROVE OF A CONTRACT
MADE BY THE DIRECTORS WITH A FIRM OF WHICH A
DIRECTOR IS A MEMBER, THE CORPORATION IS BOUND
BY THE CONTRACT

UNITED STATES STEEL CORPORATION v. HODGE

64 N. J. Eq. 807 (1902)

The directors of the United States Steel Corporation voted to retire \$200,000,000 par value, preferred stock, by issuing to the holders in exchange for such stock its bonds or cash raised by a sale of its bonds. J. P. Morgan was a director of the corporation, and a member of the firm of J. P. Morgan & Co. The corporation, acting by its directors, entered into a contract with J. P. Morgan & Co., which provided that the firm was to purchase a certain number of the bonds, and to pay for them in preferred stock or cash, in consideration of certain commissions. This contract was expressly made subject to the approval of the stockholders. J. P. Morgan & Co. formed a syndicate to insure their performance of the contract.

VAN SYCKEL, J. The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts.

In *Stewart v. Lehigh Valley Railroad Co.*, supra, Mr. Justice Dixon, in delivering the opinion of this court, says: "After an examination of all the cases cited, as also such others as I have found, and a careful consideration of the principle, and the results of regarding and disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the cestui que trust, exercised within a reasonable time; I can see no further safe modification or relaxation of the principle than this."

It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void per se.

Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors become so changed that it would be inequitable to vacate the engagement, equity would refuse to interpose.

A fortiori, when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors

to enter into a contract, when the stockholders have notice of the directors' interest, the agreement will be unassailable in the absence of actual fraud or want of power in the corporation.

In the case sub judice, the contract was in effect made between the stockholders themselves and J. P. Morgan & Co., and it cannot be successfully assailed without maintaining that stockholders are without capacity to make a valid contract with the directors of their company.

It would be manifestly contrary to fair dealing and good faith to permit stockholders to invite directors to enter into an engagement, and after the directors had put themselves in a position in which the contract could be enforced against them, to permit the stockholders to deprive them of the benefits of it.

In my investigation no case has been found which will justify such a result.

The court held that under these circumstances the corporation was bound by the contract.

RIGHT OF A STOCKHOLDER TO INSURE THE PROPERTY OF THE CORPORATION

RIGGS V. THE COMMERCIAL MUTUAL INSURANCE COMPANY

See under Insurance, page 565

DISPOSITION OF CORPORATE PROPERTY ON DISSOLUTION

WILSON V. LEARY

120 N. C. 90, 26 S. E. 630 (1897)

Civil action for the recovery of land, tried before Robinson, J., at Fall Term, 1896, of Bertie Superior Court, upon an agreed statement of facts, a jury being waived. The land in controversy was conveyed on the 5th day of July, 1849, by Henderson Wilson, the ancestor of plaintiffs, to trustees for Oriental Lodge, No. 24, Independent Order of Odd Fellows, which was incorporated under an Act of the General Assembly of North Carolina, at its session of 1850. The conveyance was in fee. The trustees and the lodge went into possession and held it until 1872, when the lodge ceased to exist, and was never revived. Under the direction of the Grand Lodge of Odd Fellows, the land was sold in 1873, to the defendants. Previous to the incorporation of Oriental Lodge by the General Assembly, it had been chartered by the Grand Lodge upon regular petition, and was one of the regularly constituted and duly organized subordinate lodges or branches of the order. It was also

agreed that the plaintiffs had never listed its property for taxation. The action was brought March 5, 1892, by the plaintiffs, as heirs at law of Henderson Wilson, the original grantor, claiming that the land reverted to them upon the extinction of the corporation. His Honor gave judgment for the plaintiffs, and defendant appealed.

CLARK, J. The plaintiffs must recover upon the strength of their own title, and not upon defects, if any, in the title of the defendants. The conveyance by their ancestor, Henderson Wilson, was in fee simple to trustees "to convey to Oriental Lodge, No. 24, I. O. O. F., when the same shall have been incorporated by the Legislature of North Carolina. It was subsequently incorporated. Though no conveyance by such trustees to the lodge is shown, the learned counsel for the plaintiffs admitted that the Statute of Uses, 27 Henry VIII, in force in this State by virtue of our statute executed the use without the execution of a deed. The grant to the trustees being in fee simple, the *cestui que* trust took in fee. *Holmes v. Holmes*, 86 N. C. 205. When the lodge ceased to exist for want of members, whether its property passes to the grand lodge of I. O. O. F. in this State, of which Oriental Lodge, No. 24, was a member, or escheated to the State for the University (Code, Sec. 2627), does not concern the plaintiffs, and is not before us. The title in fee simple had passed out of the grantor, and having vested in the Oriental Lodge, upon the extinction of the latter as a corporate entity, its property, by no just construction, could return to those whose ancestors had conveyed it in fee upon receipt of the purchase money, which he and they have kept and enjoyed.

The plaintiff's counsel insist, however, that, at the time of the conveyance, the Revised Statutes (Ch. 26, Sec. 17), provided that a corporation, unless otherwise specially stated in its charter, had existence for only 30 years, and as there was no special provision in this charter, the grantor only parted with the property for 30 years and held a resulting trust. But the conveyance was in fee, and a corporation limited in duration can take a fee simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either, without having disposed of it, the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances, but in neither case is there any reverter to the grantors. On the death of a corporation the property is usually administered by a receiver, and on the death of a natural person, by the personal representative or passes to the heirs.

By the Constitution of North Carolina (Article VIII, Sec. 1), all corporations (if chartered since 1868) are subject to extinction at any time, or their duration can be abridged or extended, at the will of the

legislature. It would now be a startling doctrine that upon the repeal of a charter, all real estate, though conveyed to the corporation absolutely in fee simple, reverts as at common law to the original grantors, to the total exclusion and loss of creditors and stockholders. On the contrary, such property, when not held on a base or qualified fee, as was the case in *State v. Rives*, 27 N. C. 297 (though it has been since held that there are no qualified fees in this *State-School Com. v. Kesler*, 67 N. C. 443), would be administered to pay creditors, the surplus being divided among the stockholders. If there were no stockholders, then the question might arise whether the property had escheated to the State, but certainly the grantors, upon such corporation becoming extinct, would have no greater right to a reversion than would the grantors to any other corporation. There was no attempt to make avail of the three years and a receiver allowed by the Code, Secs. 667, 668, to wind up a corporation and sell its property, and hence no question is raised whether they apply to a corporation which was chartered before they were enacted.

It is true, it was held in an opinion by Gaston, J. (*Fox v. Horah*, 36 N. C. 358), that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the State, and its choses in action became extinct, and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtor being absolved by the dissolution. Judge Thompson (5 *Thomp. Corp.* paragraph 6720), refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been in effect overruled in *Von Glahn v. Rosset*, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 *Com.* 307, note), says "This rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations (5 *Thompson, supra*, Sec. 6730). The subject is thoroughly discussed by Gray on *Perpetuities*, Sections 44-51, and he demonstrates that my Lord Coke's doctrines rested on the dictum of a 15th century judge (Mr. Justice Choke, in the *Prior of Spalding's Case*, 7 *Edw. IV.*, 1467), and is contrary to the only case deciding the point, *Johnson v. Norway*, *Winch.* 37 (1622), though Coke's statement has often been referred to as law. But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon a dissolution the title to real prop-

erty does not revert to the original grantors or their heirs, and the personal property does not escheat to the state." 5 Thompson, *supra*, Sec. 6746; *Owen v. Smith*, 31 Barb. 641; *Towar v. Hale*, 46 Barb. 361. The crude conceptions of corporations naturally entertained, in a feudal and semi-barbarous age, functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Coke Lit. 13b) for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision. Upon the facts agreed, judgment should be entered below against the plaintiff, dismissing their action.

Reversed.

SURETYSHIP AND GUARANTY

A CONTRACT OF SURETYSHIP CREATES AN IMMEDIATE AND DIRECT LIABILITY, AND IS USUALLY ENTERED INTO EITHER JOINTLY OR JOINTLY AND SEVERALLY WITH THE PRINCIPAL DEBTOR

READ V. CUTTS

7 Greenleaf (Me.) 186 (1831)

Assumpsit on an agreement in writing, signed by the defendant, dated January 14, 1825, as follows: "Whereas, Tristram Hooper, of Saco, has given his several notes of hand to James Read and Company, of Boston, one dated November 25, 1824, for six hundred and eighty-nine dollars and eleven cents, and the other dated November 26, 1824, for one thousand one hundred and six dollars and sixty-four cents; and whereas, said Tristram has conveyed to me by his deed of this date a lot of land in said Saco, being number," etc. "Now, for the consideration above, and in consideration that the said James Read and Company have promised to and will forbear to sue said Tristram on said notes of hand for and during the term of twelve months from the date hereof, I promise to pay the said Read and Company the sum of thirteen hundred dollars at that time, unless the same shall have been paid by said Hooper." At the trial it appeared that Hooper continued in business at Saco, having a stock of goods liable to attachment of the value of two thousand dollars, from the date of the said notes till his death in November, 1826. Hooper's estate being insolvent, plaintiffs received a dividend therefrom of four hundred and forty-four dollars and thirty-nine cents, being the pro rata they were entitled to upon the two notes mentioned in the agreement, and a third note of two hundred and twenty-nine dollars and twelve cents. The dividend was received by plaintiff, under an agreement with defendant, that the rights of neither should be affected thereby. In the summer of 1825, seven hundred dollars were paid on the largest of the two notes mentioned in defendant's agreement. In June, of the same year, the defendant allowed the land conveyed to him by Tristram to be sold and the proceeds to be paid to Hooper. No notice of the non-payment of the two notes was given to the defendant, nor demand made on him until after

the commencement of this action; nor did it appear that plaintiff had ever taken any measure to enforce payment from Hooper. Whether the action could be maintained was submitted to the court.

By Court, Mellen C. J. Strictly speaking, guarantors, indorsers, and co-obligors, or co-promisors are all sureties for others, who are the principals; but still, in common parlance, the word surety is used, in a more limited sense, to mean a co-obligor or co-promisor, entering into a contract with the principal jointly, or jointly and severally, and at the same time. He may, in all cases, be sued jointly with the principal. No demand of the debt, or notice of its non-payment by the principal, need be proved in an action against such surety, in any case. But the contract of a guarantor is entered into by him before or after that of the principal, generally, and has, in terms, a special reference thereto. His contract always being of this peculiar character, he must always be sued separately, and in many cases he can not be made chargeable unless a seasonable demand of payment be made on the principal, and notice of nonpayment given to the guarantor, where a pre-existing debt is the subject of the guaranty.

In support of the above positions, the following cases may be cited: *Hunt v. Adams*, 5 Mass. 358 (4 Am. Dec. 68); *Carver v. Warren*, Id. 545; *Moies v. Bird*, 11 Id. 436 (6 Am. Dec. 179); *White v. Howland*, 9 Id. 314 (6 Am. Dec. 71); *Upham v. Prince*, 12 Id. 14; *Oxford Bank v. Haynes*, 8 Pick. 423 (19 Am. Dec. 334); *Sage v. Wilcox*, 6 Conn. 81; *Phillips v. Astling*, 2 Taunt. 206; *Warrington v. Furber*, 8 East, 242; *Swinyard v. Bowes*, 5 Mau. & Sel. 62; *Canon v. Gibbs*, 9 Serg. & R. 202. Another distinction between a surety and a guarantor is that a promise of a surety is supported by the consideration on which the promise of the principal is founded, and no other need be proved; but the engagement of a guarantor must be founded on some new or independent consideration, except in those cases where the guaranty is given at the time the debt is contracted by the principal, and so may be considered as connected with it. In support of the above principle in relation to a guarantor are the cases of *Leonard v. Vredenburg*, 8 Johns. 29 (5 Am. Dec. 317); *D'Wolf v. Rabaud*, 1 Pet. 476; *Bailey v. Freeman*, 11 Johns. 221 (6 Am. Dec. 371); *Hunt v. Adams*, and *Sage v. Wilcox*, cited before; 3 Kent Com. 86, 87; *Oxford Bank v. Haynes* (19 Am. Dec. 334), before cited; and *Packard v. Richardson*, 17 Mass. 122 (9 Am. Dec. 123).

With respect to the question of demand and notice, in order to charge a guarantor of the payment of a pre-existing debt, there seems to be less certainty than might have reasonably been expected, considering the importance of the subject, especially in the commercial

community. In the before-mentioned cases of *Warrington v. Furbor*, *Phillips v. Astling*, *Cannon v. Gibbs*, *Sage v. Wilcox*, and *Oxford Bank v. Haynes*, and some others, demand and notice were decided to be necessary, unless in case of the insolvency of the principal. In *Redhead v. Carter*, *Goring v. Edwards*, *Allen v. Brightmore*, 20 Johns. 365, *Williams v. Granger*, *Cobb v. Little*, and some others, such demand and notice were decided not to be necessary. It is important to ascertain the true grounds of these apparently opposing decisions; and we apprehend that the principle on which they rest, when carefully examined, will explain their seeming contradictions and show their consistency. The essence of the engagement of a guarantor of the character we are considering, we apprehend, is that the debt shall be paid, if the creditor shall take the usual and legal steps to secure it, or render the principal's liability absolute. In *Warrington v. Furbor*, *Phillips v. Astling*, *Cannon v. Gibbs*, and *Oxford Bank v. Haynes*, the guaranty was that certain debts arising on bills of exchange or promissory notes, but which were not then payable, should be duly honored and paid. The case of *Bank of New York v. Livingston*, 2 Johns. Cas. 409; *Cumpston v. McNair*, 1 Wend. 457, are of the same character, and demand and notice were held necessary.

In the case of *Sage v. Wilcox* it does not appear when the note, the payment of which was guaranteed, was made payable; besides, in addition to the want of notice in due season, the court, in their opinion, say the promise alleged was absolute, but that which was proved was conditional. It is true that want of demand and of seasonable notice was one ground of the decision; but when we take into consideration the terms of guaranty, viz., "I hereby guaranty the payment of the within note one year from this date, whether a suit is brought against the signer, Jacob Wilcox, or not," it seems somewhat singular that the court considered a demand on the signer as essential. The decision is at variance with *Williams v. Granger*, and several other important cases, among which is that of *Allen v. Brightmore*, above cited. In most of the other cases before named, where demand and notice were held necessary, the plaintiff had not taken the legal steps to charge the principal debtor and obtain the money, and the omission so to do was not excused on account of insolvency. In all these and similar cases it is evident that certain measures are to be pursued by the creditor to give effect to the guaranty, cases of insolvency excepted. But when the debt, which is the subject of the guaranty, has become due and payable, and absolute before the guaranty is given, the creditor has nothing to do to perfect his legal claim on the principal, it has become perfect, and the guarantor must be deemed conusant of that fact; and

when a creditor's rights upon a bill of exchange or an indorsed note have become absolute as against all parties chargeable upon it, or when, from the absolute character of the debt guaranteed, nothing of a preliminary nature on the part of the creditor is by law required to perfect his rights, why should demand and notice, be essential to entitle him to maintain his action against the guarantor? We apprehend that upon examination it will be found that the cases cited, as well as others, in which demand and notice have been held to be unnecessary, were decided upon the foregoing distinction. In *Cobb v. Little*, Crague's note was dated April 30, 1817, payable in six months, and on the back of the note the defendant wrote these words: "I guaranty the payment of the within note in six months. Thomas Little. June 3, 1817." Here the guaranty was absolute, extending Little's term of payment beyond the six months named in the body of the note; and nothing was by law required to be done by Cobb to perfect his claim against Crague. The court held that a demand on Crague, and notice to Little, were not necessary. The court proceeded on the same principle in *Breed v. Hillhouse*, 7 Conn. 523, in which the payee of a promissory note, after it became due, received a guaranty of a third person in these words: "I hereby guaranty the payment of this note within four years." The court held it an absolute guaranty, and that demand and notice were unnecessary. Here the note being due at the time of the guaranty, nothing was required to be done to perfect the payee's rights against the promisor. So in the case of *Norton v. Eastman*, 4 Greenl. 421, the court say: "If A holds a note against B for one hundred dollars, payable in one year, and C guaranties the payment of it when due, in such a case, notice is superfluous." So in *Allen v. Rightmere*, before cited, the court decided that no demand and notice were necessary, considering the promise of the guarantor as absolute that the maker of the note should pay it, or that he himself would. In *Boyd v. Cleveland*, 4 Pick. 525, the defendant, an indorser, declared to the plaintiffs, who had no confidence in the other parties to the note, that he should be in New York when the note would become due, and would take it up, if not paid by any other party to it; and the court held that the plaintiffs were not bound to give notice of the non-payment by the maker, as in those cases where an implied promise is relied on. In *Redhead v. Carter* no notice was given, but the cause was decided on another ground, namely, that the undertaking or engagement was absolute, and so no notice was necessary. It was a case of *nisi prius*, and the promise of the defendant seems to have been considered as an independent and original contract on his part.

The case of *Jones v. Cooper*, Cowp. 228, was different from the pres-

ent; it merely presented the question whether the defendant's promise was a collateral one, and so was within the statute of frauds. And Adney's case also was one of collateral and contingent nature, and so not provable before commissioners of bankruptcy.

In the case at bar it appears that Hooper, on the twenty-fifth of November, 1824, gave his promissory note to the plaintiffs for six hundred and eighty-nine dollars and eleven cents, and on the next day gave them another note for one thousand one hundred and six dollars and sixty-four cents, both payable on demand; and that the defendant, on the fourteenth day of January, 1825, signed the agreement, on which the present action is founded; and he states that in consideration of a conveyance of a tract of land to him by Hooper, and of the plaintiff's promise to forbear to sue Hooper on said notes of hand, for and during the term of twelve months from the date of this contract, and of their actual forbearance during that term, he would pay the plaintiffs the sum of one thousand three hundred dollars at the end of said twelve months, unless the same should then have been paid by said Hooper. The consideration of this promise is a legal one; and no question is made as to its sufficiency. No demand was made on Hooper at the end of the twelve months, though for many months after that time he remained solvent and amply able to pay the notes. And it is not denied that the plaintiffs did forbear to sue Hooper during the twelve months. On these facts it is contended that this action is not maintainable, on account of the omission to demand payment of Hooper at the end of the term of credit to the defendant, and to give notice of nonpayment by him; and also on account of the laches of the plaintiffs in not collecting the money of Hooper in his lifetime. With respect to this latter objection, we would observe that it has been repeatedly decided that mere delay to pursue the principal and collect the money of him, does not discharge a surety or guarantor, provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal, made without the assent of such surety: *Lock v. United States*, 3 Mason 446; *Hunt v. Bridgham*, 2 Peck. 583 (13 Am. Dec. 458); *United States v. Kirkpatrick*, 9 Wheat. 724; *Kennebec Bank v. Tuckerman*, 5 Greenl. 130 (17 Am. Dec. 209). As to the objection that no demand was made on Hooper, or notice of non-payment given to the defendant, the cases before cited as applicable to such a guaranty as the present, furnish an answer. The liability of Hooper on his notes to the plaintiff was an absolute one at the time he signed the guaranty; they had then a perfect right of action upon them against Hooper, without any demand upon him. The defendant did not employ the language made use of in the case of *Sage v. Wilcox*, "I guaranty the payment of the note;" but

it is: "I promise to pay the sum of one thousand three hundred dollars at that time," the end of twelve months, "unless the same shall have been paid by said Hooper." If the defendant at that time had called on the plaintiffs to pay the notes according to his promise, he would have learned that they had not been paid, and that he must pay them. Nothing being necessary to be done on the part of the plaintiffs to perfect their rights as against Hooper, this case does not come within the principle of the decisions before mentioned, in which demand and notice were held necessary. The plaintiffs knew that Cutts had received a conveyance of a tract of land from Hooper by way of indemnity against loss in consequence of the guaranty; and the land thus conveyed was stated at the argument to be worth one thousand three hundred dollars or more; and this fact was not denied. This very circumstance naturally lulled the attention of the plaintiffs, and led them to the conclusion that the defendant would promptly fulfill his engagement, attend to his own interest, and take notice of those facts which might seriously affect it. Instead of all which, within less than six months after giving the guaranty, he conveyed the land, and permitted Hooper to receive the avails of it. He has thus voluntarily given up his indemnity, and has placed himself on whom to cast any blame. There is no proof that the defendant ever informed the plaintiffs of the above fact until after the commencement of the present action.

As to the question of damages, we are of opinion that the defendant is answerable to the extent of one thousand three hundred dollars, and interest thereon from January 14, 1826, unless the payments which have been made by Hooper have reduced the sum now actually due below the amount. It does not appear that those payments were specially directed to be applied in part discharge of the defendant's liability; and such being the case, the plaintiffs had the right to make the appropriation, and consider the sums paid as going to extinguish, pro tanto, the portion of the two notes not collaterally secured by the guaranty of the defendant: *Brewer v. Knapp, et al.*, 1 Pick. 332.

According to the agreement of the parties, a default must be entered.

AN ORAL PROMISE TO ANSWER FOR THE DEBT OF
ANOTHER CAN NOT BE ENFORCED

DEXTER V. BLANCHARD

11 Allen 365 (1865)

Contract brought upon an oral promise by the defendant to pay the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon.

At the trial in the superior court, before Morton, J., the plaintiff offered to prove that the horses and carriages were hired and the injury done by the defendant's minor son, to whom the credit therefore was given; and that not long after the date of the last charge the defendant's son became sick, and while so sick the plaintiff several times demanded payment of him, and thereupon the defendant verbally promised to pay the plaintiff's bill if the plaintiff would not trouble his son any further; to which the plaintiff agreed. The son afterwards died. It was admitted that the bill was not for necessities.

The judge ruled that upon these facts the action could not be maintained, and a verdict was returned accordingly for the defendant. The plaintiff alleged exceptions.

BIGELOW, C. J. The ruling of the court was in accordance with well established principles. The defendant's promise, although it may have been made on a good consideration as to the plaintiff, was nevertheless a promise to pay the debt of another, and no action can be maintained upon it. Gen. Sts., c. 105, § 1. The fallacy of the argument urged in behalf of the plaintiff lies in the assumption that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void; it is voidable only; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a valid debt. Nor can a third person avail himself of the minority of a debtor to obtain any right of security or title. Infancy is a personal privilege, of which no one can take advantage but the infant. *Kendall v. Lawrence*, 22 Pick. 540; *Nightingale v. Withington*, 15 Mass. 274; *McCarty v. Murray*, 3 Gray 578.

The effect of the doctrine contended for by the counsel for the plaintiff would be that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defense to the debt in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door for some of the mischiefs which the statute of frauds was designed to prevent.

The case for the plaintiff derives no support from the argument based on proof of an agreement by the plaintiff to forbear to sue the defendant's son, in consideration of the promise of the latter to pay the debt. It is perfectly well settled that it is not a sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage or given up some lien or claim in consequence of the de-

fendant's promise, if that advantage or relinquishment did not also directly enure to the benefit of the defendant. It is only when such relinquishment or surrender operates to transfer to the defendant the right, interest or advantage which the plaintiff gives up, or to create in the defendant some title or benefit derived from that which the other party surrenders, that the promise can be regarded as an original undertaking, and not within the statute. *Curtis v. Brown*, 5 Cush. 488, and cases cited.

Exceptions overruled.

WHERE A GUARANTY IS MADE AT THE SAME TIME THE
PRINCIPAL CONTRACT IS MADE, ONE CONSID-
ERATION IS SUFFICIENT FOR BOTH

SMITH V. MOLLESON

148 N. Y. 241; 42 N. E. Rep. 669 (1896)

Appeal from supreme court, general term, First department.

Action by James B. Smith against Phebe G. Molleson as surety on the bond of Pratt & Molleson to plaintiff. A judgment in favor of plaintiff, entered on the verdict directed by the court, was affirmed by the general term (26 N. Y. Supp. 652), and defendant appeals. Affirmed.

O'BRIEN, J. The defendant has been held liable as surety upon a bond given to secure the performance, by the contractors, of a building contract, dated November 1, 1888, in which they agreed to furnish, cut, set, and clean all the new granite work for the enlargement of a public building in the city of New York. The plaintiff agreed to pay the contractors for this work the sum of \$30,000, in monthly payments of not to exceed 80 per cent. "of the estimated value of the work performed on the building," the balance, or final payment, to be made when the work was completed. The work was to be done according to drawings and specifications referred to in the contract, and the payments made upon the certificate of the plaintiff's superintendent. The rights and obligations of the parties are specified in the contract with minute detail, and among other things, it was stipulated that, in case the contractors failed to perform, the plaintiff might take possession of the work and complete it at the contractor's expense. It is conceded that they failed to perform and that the plaintiff was obliged to complete the work himself at an expense of several thousand dollars more than the contract price. It was agreed between the plaintiff and the contractors that the latter should give to him a bond to insure the faithful performance of the contract, and, in pursuance of this agree-

ment, the defendant, in behalf of the contractors, executed, under seal, and delivered, the instrument upon which this action was brought. It bears date December 27, 1888, and was executed subsequent to the contract, and one of the conditions is that the contractors should well and truly perform the contract referred to, according to its terms, in which case the instrument should be void and of no effect, but that, in case they failed to so perform, the defendant would pay to the plaintiff his damages, sustained by reason of such non-performance, not exceeding a sum named. It is conceded that the plaintiff sustained damages by reason of the failure of the contractors to perform their contract, and the recovery is within the limits of the bond. The defense is that the bond was given without consideration, and that the defendant became released from its obligations by reason of changes in and departures from the contract guaranteed, without the defendant's consent, by the parties thereto. At the trial a verdict was directed for the plaintiff.

The plaintiff entered into the contract and bound himself, according to its terms, upon the faith of the promise of the contractors to give the bond, and it is admitted that if this was concurrent with the execution and delivery of the instrument, it would constitute a sufficient consideration. But, since the bond was given afterwards, and, as the defendant claims, subsequent to the time that the contractors had entered upon the actual performance of the contract, it is insisted that it required some new consideration. If it be true that the evidence in the case would warrant a finding by the jury that the contractors were engaged in the performance of the contract when the bond was given, it would also be true that this was by the grace and pleasure of the plaintiff, and not by virtue of any right under the contract. Their right to insist upon performance, as against the plaintiff, and to receive the benefit of the contract, was not perfected until the bond was given. Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another, furnished a consideration for the bond. *Bank v. Coit*, 104 N. Y. 532, 11 N. E. 54.

The other defense rests mainly upon a construction of the contract which the defendant claims to be the correct one. It should be observed at the outset that the contract guaranteed is, by reference, made a part of the bond, and therefore, in order to determine the scope of the defendant's undertaking, the two instruments must be read together. It is true, as the learned counsel for the defendant contends,

that the liability of a surety is *strictissimi juris*. But that does not mean that a different rule must be applied in the construction of contracts of suretyship than that which is to be applied in the construction of contracts in general. Like all other contract, the undertaking of a surety must be construed fairly and reasonably, and according to the intention of the parties. If the surety has used ambiguous language, and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will, ordinarily, prevail, if the instrument is open, reasonably, to such interpretation. It means that a surety shall not be held beyond the precise stipulations of his contract. He is not liable on any implied engagement, where a party contracting for his own interest might be, and he has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. In this respect they are ordinary commercial obligations standing upon the same footing as other contracts. *Gates v. McKee*, 13 N. Y. 232, *Bennett v. Draper*, 139 N. Y. 266, 34 N. E. 791. When the terms of the contract guaranteed have been changed, or the contract, as finally made, is not the one upon which the surety agreed to become bound, he will be released. *Page v. Krekey*, 137, N. Y. 307; 33 N. E. 311. But in this case there is no claim that the terms of the building contract, to which the defendant's bond related, have in any respect been changed by the parties to it. The most that is claimed is that, in its performance, the parties have so far departed from its terms as to change the defendant's condition, to her prejudice, and to deprive her of rights and benefits under the contract, which, otherwise, she would be entitled to by subrogation. Where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. *Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307; *Bank v. Streeter*, 106 N. Y. 186, 12 N. E. 706; *Lynch v. Reynolds*, 16 Johns. 40; *Brown v. Williams*, 4 Wend. 360; *Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Calbert v. Dock Co.* 2 Keen 638; *Warre v. Calvert*, 7 Adol. & E. 143.

The learned counsel for the defendant insists, upon his construction of the contract, that the plaintiff paid or advanced to the contractors a larger portion of the contract price than he was required to by the contract, and that it was so paid without any certificate. The contention rests upon the defendant's construction of the building contract, which, in substance, is that the provision for "monthly payments, not to

exceed 80 per cent. of the estimated value of the work performed on the building," required the estimate to be based only upon the work when actually set in the building, whereas it was in fact based upon the work actually done under or in pursuance of the contract, whether the granite was actually placed in the building or not. This is the alleged departure from the terms of the contract, which constitutes the principal ground of the defense. Before the conclusion of the learned counsel for the defendant can be adopted, we must assent to the premise from which it is sought to be deduced, and that requires us to ascertain and determine the true meaning and intention of the clause of the contract above quoted. It must be given a fair and reasonable construction, and the general situation will throw some light upon the meaning of the written words. It appears that the granite required was to be quarried in Nova Scotia, transported from the quarry to a place in Connecticut, where it was to be dressed, and then transported to New York, and set in the building. The work involved in the preparation and carriage of the material was by far the most expensive part of the contract, and it appears that the contractors had no means to meet this outlay, except the monthly payments, so that if they could realize nothing until the stone was placed in the building, they would be practically unable to perform the contract at all. This would be an unreasonable construction, and would, if acted upon, operate so oppressively as to place the contractors at the mercy of the owner, a view that is always to be avoided when possible. *Russell v. Allerton*, 108 N. Y. 292, 15 N. E. 391. It would deprive them of all the right to monthly payments except when and to the extent that granite had actually been placed in the walls, however large their outlay for procuring and preparing the material may have been during the month. The parties had the right to give to the expression, "work performed on the building," a broader meaning, which could very properly include the value of any work done or materials procured under the contract towards its erection, although the granite procured and prepared had not yet been placed. Since no payments were made in excess of 80 per cent. of the value of the work performed in setting the stone, and in procuring and preparing them, and as all the materials so procured and prepared actually went into the building, no advances were made by the plaintiff to the contractors beyond the fair requirements of the contract. It is said that it cannot be supposed that the plaintiff contracted to pay any part of the contract price for material at the quarry, and at the place where it was to be prepared, or for the work performed in preparing the same for use, before it could be known that it would ever actually reach the building. But since the monthly payments

were stipulated for purpose of enabling the contractors to prosecute the work, and as the operation of placing the granite in place when prepared was the least part of it, we do not think that this view would be unreasonable or improbable. It gave to the plaintiff reasonable assurance and protection against loss, and at the same time enabled the contractors to prosecute the work. While the plaintiff is described in the contract as owner, he in fact had no interest whatever in the building, but was the general and immediate contractor from the city for the erection of the whole building, and the defendant's principals were his subcontractors for a particular and specific part of the work, namely, the granite work. The plaintiff was not entitled to his contract price from the city until the building was completed, though the officers representing it had discretion to make advances. Moreover, by a clause in the contract, the plaintiff, in case the subcontractors abandoned the work or failed to perform, could terminate the contract and go on with the work himself, and in that event the material in process of preparation should belong to him for the purpose of completing the work, whether such material was at the building, at the quarry, or at some other place. So that the plaintiff, in stipulating for monthly payments, estimated upon the work actually performed, whether in the building or not, assumed nothing more than the ordinary and usual risks incident to all contracts of that character. We do not think, therefore, that the meaning of the contract should be made to depend upon the use of the words, "on the building," when we can see, from the situation of the parties, the nature of the work, and other provisions of the instrument, that the intention was to make the advances as the work progressed. To give to it the other construction would, in practice, disable the contractors at the very outset from performance, and impose upon the defendant a liability, inevitable from the beginning, and possibly in a much larger amount than has followed the construction adopted by the parties themselves.

The objection that the payments were made without the certificate may be answered in the same way. The owner could dispense with it if he so elected, under the terms of the contract, if not upon general principles, and since the payments made without it were not greater in amount than, upon the true construction of the contract, they should have been if it had been exacted, the omission of the owner to insist upon it did not prejudice the surety. We are not dealing, now, with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to operate to release the surety, must be of such a character that it can be said that her position was changed to her prejudice. It should also be observed

that there is a clause in the contract the material part of which reads as follows: "Should the owner, at any time during the progress of the said work, request any alterations, deviations, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract. The defendant, having, by reference, in effect made the contract a part of the bond, must be deemed to have assented to this provision, and to any changes or deviations in performance from the building contract made under it. She has, in effect, guarantied the performance of a written contract between other parties, which, by its terms, permitted the parties to change it or deviate from it. While it is not important to consider the real scope of this clause, since we prefer to dispose of the questions in the case upon the ground that there was no material departure from the contract, when properly construed, it should be noted that she consented in advance to changes of some character which are permitted by the contract in language quite broad and comprehensive. It would not be difficult to show that the plaintiff might, under this provision at least, dispense with the formality of a certificate when called upon by the contractors, from time to time, for some portion of the contract price, without discharging the surety, even though it was more important to the defendant's interest and protection than it appears to be. It is manifest that the provision was intended for the benefit of the owner alone, and he could waive it without affecting the defendant's liability.

The contractors having failed to complete the work, the plaintiff gave the notice required by the contract in order to terminate it. The contract provides when and upon what contingencies the plaintiff could terminate, and the manner of proceeding for that purpose. The final act which was to put an end to the contract was taking possession of the premises by the plaintiff. The notice may have been a necessary step, or formality in that direction, but, of itself, it did not operate to bring the contract to an end. It was clearly within the power of the plaintiff to recall it, after given, if not upon general principles, then under the permission contained in the contract. It appears that he was induced, subsequently, to allow the contractors to go on, and they again attempted to complete the work, and again failed. It is said that the loss which the plaintiff sustained, and for which the recovery was had, occurred under this permission, and the defendant's counsel treats this last effort at performance as a new contract in regard to which the surety was not bound. It was manifestly nothing more than a mere waiver or recall of the notice for the termination of the contract, and the work was performed and payment made, not upon a new contract,

but upon the old one, up to the time that the final notice was given, when the plaintiff was obliged to take possession of the work. The case was very fully considered in the court below, and, as we have sufficiently indicated the ground of our concurrence in the decision upon points that are controlling, it is unnecessary to notice other and minor questions in the case. The judgment should therefore be affirmed, with costs. All concur.

Judgment affirmed.

CONSIDERATION NECESSARY TO BIND A CONTRACT OF
SURETY MAY CONSIST OF A BENEFIT TO THE PRIN-
CIPAL DEBTOR OR HARM OR INCONVENIENCE TO THE
CREDITOR

THE PENNSYLVANIA COAL CO. v. BLAKE

85 N. Y. 226 (1881)

Appeal from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made April 1, 1879, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

FOLGER, CH. J. The first point made by the appellant is, that the mortgage given by her was without consideration and is void.

It is so, that the appellant took no money consideration, nor any strictly personal benefit, for the giving of the mortgage by her. It was made for the benefit of others than her, entirely as a security for debts owing by them, and to procure for them further credit and favor in business. In other words, the lands of the appellant became the surety for the liabilities of the business firm of which her husband was a member.. It is so, also, that the contract of surety needs a consideration to sustain it, as well as any other contract. (Bailey v. Freeman, 4 Johns. 280; Leonard v. Vredenburg, 8 Id. 29.) But that need not be something passing from the creditor to the surety. Benefit to the principal debtor, or harm or inconvenience to the creditor, is enough to form a consideration for the guaranty; and the consideration in that shape may be executory as well as executed at the time. (McNaught v. McClaughry, 42 N. Y. 22; 8 Johns., supra.) Now, here was an agreement by the plaintiff to extend the payment of part of the debt owing by the principal debtor for a definite time, if the debtor would procure the mortgage of the appellant as a security for the ultimate payment of the amount of the debt thus extended. (Sage v. Wilcox, 6 Conn. 81; Breed v. Hillhouse, 7 Id. 523.) Though the actual execu-

tion of the mortgage by the appellant was on a day subsequent to that of the agreement between the creditor and the principal debtors, and subsequent to the dates of the extension notes, the mortgage and notes were made in pursuance of that agreement, in consideration of it and to carry it out. The findings are full and exact on this point, and are sustained by the testimony. There is no proof that the actual delivery of the notes and mortgage was not contemporaneous; though the dates of the notes and the mortgage and the entry of credit in the books of the plaintiff do not correspond. All was done in pursuance of one agreement, and the plaintiff was not bound to forbearance until the mortgage was delivered. It was not until then that the agreement to forbear was fixed and the consideration of benefit to the principles was had. It was not, therefore a past consideration.

It is not necessary to consider whether the appellant is not estopped by the agreement of February 25, 1876, from setting up a want of consideration.

The second point made by the appellant is that one of the notes given on the extension was paid by the principals, and that the land is, by so much as the amount of that note, relieved from the lien of the mortgage. The difficulty in upholding this position is in the facts. Doubtless it was the purpose of the principals, when they went to the creditor with the checks, that the note should be paid. They never made the positive offer of them to the plaintiff to that end, in such way as that the plaintiff must take them for that explicit purpose or reject them. If the principals had insisted that the checks should be applied in payment of the notes, they would have been; but upon being given their option to have them thus applied and their credit on open account stopped, or applied on open account and their credit thereon continued, they preferred the latter. The creditor recognized the right of the debtors to apply where they chose, and but exercised its right to urge and convince to a different application. The appellant, as surety, cannot take any advantage from what passed, for there was never an application to the notes insisted upon by the principals, or made in fact, or more than spoken of, and there was acquiescence by each of the principals in the course that was taken. The checks were not received as a payment; they were not left as a payment; they were left in abeyance, their ultimate application or return to be determined after further consideration. Moreover, by the subsequent agreement, made by the appellant, the note is treated as unpaid, and enters into, and the subject-matter thereof is part of, the joint debt of the principals, assumed by the appellant's husband, guaranteed by her and for the payment of which she pledged her separate estate. This agreement was made on

good consideration, expressed in the instrument, and unless the agreements of parties who are married women are to be nothing more substantial than summer winds, she is estopped thereby.

The third point is that there should not have been a personal judgment against the appellant. The judgment is based upon the guaranty contained in what we have called the subsequent agreement, and which contains the individual and personal guaranty by the appellant of the payment of a sum named, upon demand therefor made by Clarence A. Blake, and his refusal or neglect to pay. It is averred in the complaint that a demand was made upon Clarence A. Blake, and his refusal or neglect to pay. There is a general denial in the answer of the allegations of the complaint, save those that state the execution of the mortgage and the agreement. There is no finding that a demand was made. Demand and notice are often duties of imperfect obligation, and may in such case be omitted, if the facts are such that no benefit can result from the making of them. (*Hickling v. Hardey*, 7 Taunt, 313); but then he who should have made the demand must show the inutility of them; and that was not done here. The appellant is a surety, and demand of the principal is a part of the contract (*Nelson v. Bostwick*, 5 Hill 27); it is one of the conditions precedent to her obligation to pay. If this position had been taken or relied upon at the trial, we should feel obliged to maintain it here. There is nothing in the case to show that it was suggested or thought of at the trial, where the plaintiff might have shown a demand made, or the utter inutility of one. The denial in the answer is not one that would positively indicate a purpose to make the matter of a demand one of the contested issues on the trial, though it would have been enough on which to take the position there. It does not appear that the point was made at General Term; rather, from a perusal of the opinion there delivered, we should gather that the position taken was not that there had been no ground for personal liability established, but that the decision of the trial court had made the personal liability absolute and not contingent upon a deficiency arising upon a sale of the lands, a position which is met by the General Term in its observation that though such is the decision, the judgment is as the appellant would have it, in that respect. On the whole we think that the case shows no error in this particular calling for a reversal or even a modification.

The fourth point is, that if there was no payment of the first note that fell due, then there was an extension of time given to the principals that discharged the lands. This is claimed to grow out of the application of money on open account instead of on the note. It is said that the note not having been paid, the time of payment of it was by that

act or omission extended. The test is, could the surety have paid the note, and enforced the consequent liability against the makers?

There was no valid agreement between them and the payee for an extension, which either could have maintained against the other. The payee could not, on the ground of a valid extension, have lawfully refused the offer of the surety to pay the note; nor could the makers on that ground of a valid extension, have lawfully refused the offer of the surety to pay the note; nor could the makers on that ground have lawfully resisted the claim of the surety for the amount, had it been paid. Besides, upon this point as well as upon others in the case, the subsequent acts and agreements of the appellant estop her from setting up such facts against a recovery.

It follows that the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

A CONTRACT OF GUARANTY MAY BE ACCEPTED BY
DELIVERY AND PERFORMANCE OF THE CONSIDERA-
TION WITHOUT AN ACTUAL NOTICE OF ACCEPTANCE

DAVIS v. WELLS

104 U. S. 159 (1881)

Error to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. Justice Matthews delivered the opinion of the court.

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co. unconditionally at all times, any indebtedness of Gordon & Co. a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000) for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"Erwin Davis. (Seal).

"J. N. H. Patrick. (Seal).

"Witness: J. Gordon."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence, that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over \$9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of \$6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed, and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendant's counsel requested the court, among others not necessary to refer to, to give the jury the following instructions, numbered first, second, third and fifth:—

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it; and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made and no notice given to the defendants the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted.

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount \$10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff bind the defendants and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of said delivery of said guaranty, and since, and which were unpaid at the date of the commencement of this suit, not exceeding \$10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding \$10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and, further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the

question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled and what rule of decision is applicable to the facts of the present case.

In *Adams v. Jones* (12 Pet. 207, 213), Mr. Justice Story, delivering the opinion of the court, said: "And the question which under this view, is presented, is whether, upon a letter of guaranty addressed to a particular person or to persons generally for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell v. Clarke*, 7 Cranch, 69; *Edmonston v. Drake*, 5 Peters' Rep. 624; *Douglass v. Reynolds* 7, Peters' Rep. 113; *Lee v. Kick*, 10 Peters, 482; and again recognized at the present term in the case of *Reynolds v. Douglass*. It is in itself a reasonable rule enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached; and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds v. Douglass* (12 Pet. 497, 504), decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted;" and he added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it in order to constitute a binding promise, in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly not only from a particular consideration of the cases themselves, but was formerly declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in *Louisville Manufacturing Co. v. Welch* (10 How. 461, 475), where he uses this language: "He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in *Wildes v. Savage* (1 Story 22) Mr. Justice Story, who had delivered the opinion in *Douglass v. Reynolds* (7 Pet. 113), after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case for the agreement to accept was contemporaneous with the guaranty, and indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee

shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for as Professor Langdell has pointed out in his *Summary of the Law of Contracts* (Langdell's *Cases on Contracts*, 987), "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes v. Savage* (*supra*), where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring, notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being

that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times," etc.—cannot have the effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, "for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence v. McClamont* (2 How. 426, 452), and was overruled. Mr. Justice Story said: "The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would not be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation on consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman v. Tooth* (5 Bingham's New Cases, 577), where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties: and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety, and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire what effect is to be given to the use of the words which declare that the guarantors thereby "guarantee unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of ten thousand dollars for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligations are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., by any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co. might securely look to guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court, that, notwithstanding the

contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions,—

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and,

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co. to notify the defendants of the default the plaintiffs could not recover upon the guaranty.

For if the necessity in either or both of these contingencies existed to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute and all conditions were waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defence.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision in *Louisville Manufacturing Co. v. Welch*, supra. An unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty. It was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balance of Gordon & Co.'s account, which was entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned.

The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record.

Judgment affirmed.

MERE DELAY ON THE PART OF THE CREDITOR IN ENFORC-
ING THE OBLIGATION AGAINST THE PRINCIPAL
WILL NOT DISCHARGE THE SURETY

ALLEN v. HOPKINS

98 Ky. 668; 34 S. W. Rep. 13 (1896)

Appeal from circuit court, Boyd county.

Action by John Allen against John C. Hopkins and others. Judgment for defendants, and plaintiff appeals. Reversed.

HAZELRIGG, J. Several years prior to 1886 John Allen loaned to the firm of Hogan & Son \$1,000, and upon the back of the firm's note for that sum the names of Hopkins and the other appellees appeared as accommodation indorsers. On June 11th of the year named, the form of the paper was changed, and under the firm's name the appellees wrote their names as sureties. This note was due in 12 months, and contained no provisions as to interest. On it were the indorsements, "Interest paid up to June 11, 1888," and "Interest paid up to June 11, 1889." In November, 1889, suit was brought against the principals, and judgment obtained; but it appears they had become insolvent, and in October, 1890, this action was instituted against the sureties. They pleaded that, for a valuable consideration, the payee had extended indulgence to the principals for a definite period, and forbore to sue on the original contract, and whether or not this is true is the only question presented on this appeal. The contention of the sureties is that the testimony shows that, upon the maturity of the note, on June 11, 1887, Hogan & Son paid Allen \$100, a like sum on June 11, 1888, and a like sum on June 11, 1889; that upon the payment of each of these sums Allen agreed that the firm shall keep the money for another year, the consideration for the extension of credit being the payment of usurious interest, or \$40 each year in excess of legal interest; that this was a novation, and effected their discharge, or, at any rate, here was an agreement, in consideration of interest to be paid, by which a definite time was fixed within which the payee had lost his right to resort to his legal remedy. It is conceded that no interest was paid in advance. The principal agreed, when he borrowed the money, to pay 10 per centum interest per annum, and at the maturity of the note, in June, 1889, he paid the exact sum he agreed to pay, and no more. So far, therefore, the surety is not affected. If, however, in addition to complying with its provision to pay this interest, the firm secured a valid and enforceable contract to keep the money another year,—a contract which would prevent Allen from suing for his money, or the firm from paying it if it so desired,—

then the original attitude of the parties has been changed, and the sureties are released. The proof on the particular point involved is within a small compass, though not altogether free from confusion. Allen is positive that the only agreement ever made was that the Hogans were to pay him 10 per cent. interest. Hogan, Sr. upon whose testimony the sureties rely, proves that he agreed to pay, and did pay, 10 per cent. at the end of each year as interest for the preceding year, and it was then agreed that the firm might keep the money for another year at the same interest. On cross-examination, he states that there was no consideration given by him, directly or indirectly, that Allen should not collect his money whenever he pleased. The testimony of Hogan, Jr., the only other witness, is too indefinite to be of any value. It is manifest that the payment of the \$100 did not to any extent form the basis of the agreement to let the Hogans keep the money for a succeeding year. The agreement to extend the credit for a year was solely because of the promise of the Hogans to again pay a like sum at the end of the extended period. They paid this interest solely because they agreed to do it. It was their contract. So far, therefore, as the various payments of interest are concerned, the rights of the sureties are not affected; and the simple question remains, was there an agreement to extend the time of payment for a definite time in the future in consideration of a promise to pay interest at the rate stated? It is clear however, that the rate agreed on is immaterial. So far as it was beyond the legal rate, it was usurious, and the contract was not enforceable save to the extent of the legal rate. But while the note, after the first year, bore 6 per cent., and an agreement that that rate should be paid was no more than the law said should be paid, yet the promise to extend the time definitely in consideration of an agreement to pay the legal rate would be based on a valuable consideration, because, as said in *McComb v. Kittridge*, 14 Ohio 351, cited and approved in *Robinson v. Miller*, 2 Bush. 188, "the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of time as there was for the original loan." A careful examination of Hogan's testimony convinces us that the arrangement he had was a general one, commencing in 1883, when he first borrowed the money, that he was to pay 10 per cent. interest at the end of each year, and was to keep the principal sum at that rate so long as he wanted it or the payee did not choose to demand it. While the witness, in his examination in chief, speaks with some positiveness of his agreement to keep the money another year, on his cross-examination he qualifies his statements by saying, in one instance, "the only agreement we had, I was to pay him 10 per cent. for his money."

And from his language, quoted heretofore, it is manifest that there was no agreement by which the payee might not collect his money "when-ever he pleased to do so."

From the testimony as a whole, we are impressed with the belief that great surprise would have been expressed by all the parties if, upon the tender of the money by the Hogans, Allen had refused to accept it by reason of an agreement that the payors were to keep it for any definite period in the future, or if Allen had demanded the principal and the Hogans had asserted the right to keep it for any specified time. The alleged arrangement or agreement is entirely too indefinite to support the belief that we have here a case of a legal novation. We cannot believe that the proof authorizes the conclusion that, by any new contract, the sureties were denied any of their rights, or were at all obstructed in any of their remedies, legal or equitable. They could have paid the debt at any moment, and have been subrogated to the rights of the creditors, or they could have required the creditor to sue notwithstanding the indefinite arrangement existing between the principal and his debtor. In reaching these conclusions, we have not overlooked the circumstances surrounding the parties to be affected. Allen was an old man,—over 73,—and apparently unlettered. He was simply willing to let the earnings of his farm and log business stay out at 10 per cent, as long as his security was good. To construe his passive indulgence into an agreement binding him not to collect his money would be a perversion of the proof as affected by the surroundings. The debtors were quite willing to keep the money as long as they were not required to pay it, but never thought to defeat recovery at any time by the plea of an agreement to extend the credit for any definite time. At least, they did not do so when sued in November, 1889, as they might have done had such an agreement existed. The sureties were residents of the same town, and it is fair to presume, knew the debt had not been paid. Their remedies were, in fact, unobstructed; and if they did not choose to urge the collection of the debt, they and not Allen must bear the resulting loss. Judgment reversed, for proceedings consistent with this opinion.

GUARANTOR OF PAYMENT IS IMMEDIATELY AND ABSOLUTELY LIABLE TO THE CREDITOR

ROBERTS V. HAWKINS

70 Mich. 566; 38 N. W. 575 (1888)

Error to Superior Court of Grand Rapids. Assumpsit.

LONG, J. January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"\$1,000.

Grand Rapids, Mich. January 12, 1884.

One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received.

Lyman D. Follett."

And defendant signed an indorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within. Value received.

L. E. Hawkins."

On the delivery of this note to plaintiff, she paid Follett \$1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of non-payment was given defendant then or at any time prior to June 8, 1887. January 25, 1886, Follett paid the interest for the year, and January 17, 1887, for the following year. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its non-payment, rested. Defendant then sought to make his defense as pleaded, and offer to show:

1. That he was an accommodation guarantor, without consideration or security.
2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.
3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the non-payment of this note given to defendant, nor any demand made on him for the payment thereof.
4. That at the maturity of this note, and for some considerable time thereafter—at least a year—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.
5. That when defendant, on June 8, 1887, learned of the non-payment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declarations. Judgment being entered on the verdict in favor

of plaintiff for the amount of the note and interest, defendant brings the case into this court by writ of error.

The declaration contains three counts. The first alleges the guaranty, demand of the maker at maturity, non-payment and notice of said demand and non-payment to defendant at maturity.

The second alleges the guaranty, the refusal by maker to pay at maturity, and notice to defendant, at maturity, of maker's refusal.

The third is the common counts in assumpsit, with copy of note annexed, and an alleged indorsement on back of L. E. Hawkins, without any guaranty over it.

The plea is the general issue, with notice of the defense of release by plaintiff's failure to give notice of non-payment to defendant, and the consequent damage and loss to him thereby.

It is claimed that the court erred in receiving the note and guaranty in evidence under the third count in plaintiff's declaration, for the reason that the note and guaranty offered were not the note and guaranty set forth in that count: That the contract set out in plaintiff's third count was that defendant had indorsed his name in black on the back of the note, not payable to his order; and that this would make him a maker of the note, and liable as such, while the note offered had a guaranty of payment indorsed thereon. Defendant claimed that this was a variance, and that the court should have excluded the guaranty under this third count, and confined the verdict to a recovery under the first two counts.

As we view the case, however, this objection has no force. The plaintiff being entitled to recover under the first and second counts of the declaration, the defendant was not prejudiced in the course taken by the court in not withdrawing all consideration of the case under the third count. The declaration was sufficient in the first two counts to allow a recovery thereunder.

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

"Q. When that note became due, in January, 1885—January 15—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrelevant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that

he had no notice of the non-payment of the note prior to June 8, 1886; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at that time, the maker of the note was solvent, and for some considerable time thereafter—probably a year—and that the defendant could, if he had any knowledge of its non-payment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the non-payment of the note, the maker was insolvent, and out of the State, and no security could have been obtained by the defendant; the counsel then saying—

“That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother’s argument; and, if we have no right to show that defense, then, of course, there remains nothing but for the court to direct a verdict for the amount of the note and interest.”

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant’s offer to prove this state of facts must be taken as true. *Clay, etc., Ins. Co. v. Manufacturing Co.*, 31 Mich. 356. Under this offer by the defendant, the issue is made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of non-payment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff’s laches in not giving notice to the defendant of the non-payment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court’s ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and

a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. 2 Pars. Cont. 3.

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. 3 Add. Cont. Sec. 1111; 3 Kent. Com. 121; Wright v. Simpson, 6 Ves. 734.

In the case of *Pain v. Packard*, 13 Johns. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. *King v. Baldwin*, 2 Johns, Ch. 554. Two years later the last decision was reversed by the court of errors by casting vote of the presiding officers, a layman, and against the opinion of the majority of the judges. *King v. Baldwin*, 17 Johns. 384.

In the case of *Brown v. Curtiss*, 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of non-payment, and the note was dated April 2, 1838, and payable six months after the date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the

time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

"The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money from him Proof that when the note became due and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity.

"If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligations to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. *Bellows v. Lowell*, 5 Pick. 310; *Davis v. Higgins*, 3 N. H. 231; *Page v. Webster*, 15 Me. 249; *Dennis v. Rider*, 2 McLean, 451.

In *Train v. Jones*, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that he shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of non-payment." *Noyes v. Nichols*, 28 Vt. 174.

In *Bloom v. Warder*, 13 Neb. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. *Breed v. Hillhouse*, 7 Conn. 528; *Bank v. Hopson*, 53 Conn. 454 (5 Atl. Rep. 601); *Foster v. Tolleson*, 13 Rich. Law, 33; *Machine Co. v. Jones*, 61 Mo. 409; *Barker v. Scudder*, 56 Id. 276; *Norton v. Eastman*, 4 Greenl. 531; *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365; *Bank v. Sinclair*, 60 N. H. 100;

Gage v. Bank, 19 Ill. 62; *Hungerford v. O'Brien*, 30 Minn. 306 (34 N. W. Rep. 161).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

The court properly directed the verdict for the plaintiff and the judgment of the court below must be affirmed, with costs.

The other justices concurred.

A CONTRACT OF GUARANTY IS A COLLATERAL UNDERTAKING, AND THE GUARANTOR IS LIABLE ONLY WHEN HIS PRINCIPAL IS ALSO LIABLE

MERCHANTS' NAT. BANK V. CITIZENS' STATE BANK

93 Iowa 650; 61 N. W. Rep. 1065 (1895)

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Action at law on an alleged guaranty of a draft. At the conclusion of the evidence for the plaintiff, the court sustained a motion to direct the jury to return a verdict for the defendant. A verdict was returned as directed, and upon it a judgment in favor of the defendant for costs was rendered. The plaintiff appeals. Affirmed.

ROBINSON, J. In December, 1889, B. Arentz was engaged at Ocala, Fla., in the business of buying and selling oranges, and O. W. Butts was in the wholesale fruit and commission business in Council Bluffs, Iowa. Butts had ordered of Arentz a car load of oranges, which was shipped from Ocala to Council Bluffs, the bill of lading being taken in the name of Arentz. He drew a draft on Butts for \$560, the price of the oranges, payable to the plaintiff, a banking association organized under acts of congress and doing business at Ocala, Fla., at 30 days after sight. Before the plaintiff took the draft, it required a guaranty

of payment by a bank in Council Bluffs. Arentz notified Butts of the demand, and he induced the cashier of the defendant, a corporation of this state, to sign and send to the plaintiff a telegram, of which the following is a copy: "Council Bluffs, Iowa, Dec. 11, 1889. To Merchants' National Bank, Ocala, Fla.; Will guaranty Butts' draft for car oranges from B. Arentz. Citizens' State Bank. Chas. R. Hannan, Cashier." When the telegram was received, the plaintiff purchased the draft, taking the bill of lading, which was attached to it, and forwarded them for collection. The oranges arrived in Council Bluffs in bad order, and Butts refused to receive them, and refused to accept the draft. The defendant refused to pay the draft. Arentz is insolvent, and this action is brought against the bank on its guaranty. The answer of the defendant alleges that the guaranty was of the solvency and ability to pay of Butts; that the oranges were never delivered to him, and that he never accepted the draft, nor became a party to it; that the defendant is a corporation, and had no power to enter into a contract to guaranty the payment of a draft; and that there was no consideration for the guaranty. In a reply, the plaintiff alleged that it was usual and customary for the defendant and for banks, where it was doing business, to make such guaranties; that, at the time the one in question was made, an arrangement had been entered into between the defendant and Butts by which he was to hold the defendant harmless on the guaranty, and that it had money and other property in its possession which belonged to him, of a value exceeding its possible liability on the guaranty; that, by reason of these facts, the defendant is estopped to assert that the guaranty was executed without authority and without consideration. The appellant contends that the guaranty was authorized by the articles of incorporation of the defendant; that, if it was not the plaintiff was a good-faith purchaser of the draft for value, and, as such, is entitled to protection, that, as the reply was not assailed, an estoppel must be regarded as sufficiently pleaded; that the court erred in excluding evidence which tended to prove an estoppel, and erred in taking the case from the jury.

The appellant may be right in its claim in regard to these matters, and not be entitled to recover in this action. If it be conceded that the guaranty was valid, the question which remains to be determined is whether it created any liability under the facts which the evidence tends to establish. As has been stated, the draft was for a carload of oranges, which was never received by Butts. The bill of lading was taken in the name of the shipper, Arentz; was transferred to the plaintiff; and was pinned to the draft when it was presented to Butts for acceptance. This must have been done to secure the payment of the draft. There was never any actual or constructive delivery of the oranges to Butts.

Forcheimer v. Stewart, 65 Iowa 596, 22 N. W. 886. They were worthless when they reached Council Bluffs. It was the duty of the consignor to deliver them in merchantable condition, and it cannot be claimed, under the evidence, that Butts was ever under any obligation to receive them. Therefore, he was not liable by reason of his refusal to accept the draft. The form of the undertaking of the defendant was that he would "guaranty Butts' draft for car load of oranges from B. Arentz." It was not to be a guaranty of Arentz' draft, nor of a draft drawn on Butts, and not accepted by him, but of one on which he was liable, drawn for a car of oranges. In view of the admitted facts in this case, the conclusion is irresistible that the defendant did not undertake to guaranty the payment of anything for which Mr. Butts should not be liable. Its liability was not intended to be extended beyond his, and the form of the guaranty was sufficient notice to the plaintiff of the fact. To "guaranty" is to promise "to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who is, in the first instance, liable to such payment or performance." *Bouv. Law Dict.; Manufacturing Co. v. Littler*, 56 Iowa 603, 9 N. W. 905. Since Butts never became liable on the draft, the guaranty of the defendant has never become operative, and there can be no recovery on it.

There is no ground for claiming that the plaintiff was a good-faith purchaser of the draft for value. It knew when it received the draft that it had not been accepted, and that it had been drawn against a consignment of oranges which had not been delivered. It must be charged with knowing from the form of the guaranty that the defendant would not be liable unless Butts became responsible for the payment of the draft. Therefore, to show that the bank of Council Bluffs habitually gave guaranties like that in suit, and that the defendant was estopped to deny that it was a valid obligation, would have been without effect, and the plaintiff could not have been prejudiced by the refusal of the court to receive evidence to prove the estoppel pleaded.

Facts admitted or proven without conflict in the evidence showed that there was nothing upon which a verdict for the plaintiff could have been founded, and the district court did not err in directing a verdict for the defendant. Its judgment is affirmed.

A GUARANTOR OF COLLECTION IS LIABLE ONLY WHEN
THE CREDITOR CANNOT WITH DUE DILIGENCE
COLLECT OF THE PRINCIPAL DEBTOR

McMURRAY V. NOYES

72 N. Y. 523 (1878)

RAPPALLO, J. The guaranty on which this action is brought is contained in an assignment of a bond and mortgage, and is in the following form:

"I hereby covenant that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the cost of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns on demand."

On the part of the appellants, it is contended that this guaranty is subject to the rules applicable to guaranties of collection, and thus laches in foreclosing the mortgage, after default is a defense. The respondents insist that it is a guaranty of payment, and that they were under no obligation to use diligence in endeavoring to collect the mortgage debt by foreclosure

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.

These rules are well settled and are controverted, and the only question is to which class of guaranties the one now before us belongs.

It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay, in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently con-

ditions precedent, and the general principle is, that wherever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such a condition must be performed in good faith and with due diligence. It is upon this principle that, in case of a guaranty of collection, diligence is required of the creditor.

I am unable to see why this principle is not applicable to the guaranty now in controversy. The respondents claim that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted, and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is, that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of, that the demand cannot be collected, the guarantor will pay; while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that extent the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it.

The case of *Goldsmith v. Brown* (35 Barb. 484) is relied upon by the respondents as sustaining their position. In that case the covenant was, as construed by the court, to pay the deficiency upon the mortgage debt whenever the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained. The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing and binding the covenantor to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving diligence required by the general rules of law in performing the condition.

The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of ten months of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value was reduced below the amount of the mortgage debt. It cannot be questioned that this delay was sufficient to constitute laches. In *Craig v. Parkis*, 40

N. Y. 181, a delay of six months in foreclosing a bond and mortgage was held to be laches which discharged a guaranty of its collection.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

THE LIABILITY OF A SURETY CAN NOT BE EXTENDED
BY IMPLICATION BEYOND THE TERMS
OF HIS CONTRACT

CRANE V. SPECHT

39 Neb. 123; 57 N. W. Rep. 1015 (1894)

Error from the district court of Douglas county. Tried below before Doane, J.

HARRISON, J. In this case, an action in the district court of Douglas county, Nebraska, the plaintiff the Crane Company, plaintiff in the court below and in this court, sought to recover of defendant Christian Specht a certain sum which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company. The petition of plaintiff is as follows:

"The plaintiff in the above entitled cause, complaining of defendant therein, for a cause of action states that said plaintiff is a corporation duly organized under the laws of the state of Illinois; that on and prior to August 23, 1889, Crane Bros. Manufacturing Company was a corporation organized and doing business under the laws of the state of Illinois, and was engaged in the sale of plumbing and other materials; in the city of Omaha, Nebraska. That prior to said August 23, 1889, said Crane Bros. Manufacturing Company had sold and furnished to one A. C. Lichtenberger goods and materials; that for said goods said Lichtenberger was indebted to said Crane Bros. Manufacturing Company, and at said date said Crane Bros. Manufacturing Company, refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods thereafter delivered, should be guarantied by some responsible party; that in consideration of Crane Bros. Manufacturing Company's selling additional goods to said Lichtenberger, said defendant Christian Specht executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Company and the payment of all materials which said Lichtenberger should thereafter purchase of them; that thereafter said Crane Bros. Manufacturing Com-

pany, relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials,—a copy of said guaranty is hereto attached, marked Exhibit 'A,' and made a part of this petition; that afterwards the said plaintiff became incorporated and succeeded to the business and interest of said Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company; that, relying upon said guaranty made by said Christian Specht to said Crane Bros. Manufacturing Company, said plaintiff sold and furnished said Lichtenberger goods and materials; that said sales made by plaintiff to said Lichtenberger were made with the knowledge and consent of said defendant and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger under said guaranty to said Crane Bros. Manufacturing Company, and that said goods were furnished by said plaintiff relying upon said guaranty and at the request of said defendant that said goods should be so furnished; that a statement of said goods furnished by said Crane Bros. Manufacturing Company, and said plaintiff to said Lichtenberger in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit 'B,' and made a part hereof; that on account of goods so furnished there remains now due said plaintiff the sum of eight hundred eighty-one dollars and ninety-nine cents (\$881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore the plaintiff demands judgment against said defendant in the sum of one thousand dollars (\$1,000), and the costs of suit."

The defendant answers the petition as follows:

"First. That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies the same.

"Second. The defendant, further answering, admits that the Crane Bros. Manufacturing Company sold and furnished to the said A. C. Lichtenberger on or about August 23, 1889, some goods and merchandise; and further admits that on the 23rd day of August, 1889, he executed the guaranty mentioned on the petition, of which Exhibit 'A' is a copy.

"Third. This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company, and cannot admit, and therefore denies the same.

"Fourth. The defendant, further answering, denies that the plaintiff sold and furnished said Lichtenberger goods and materials as alleged

in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said Lichtenberger, or ever in any manner whatever agree to become liable for the same, and denies that there is due the plaintiff the sum of \$881 from said Lichtenberger, or any part thereof.

"And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

"Wherefore the defendant, having fully answered said petition, prays to be hence dismissed with his reasonable cost."

Exhibit "A," the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

EXHIBIT "A"

Omaha, Neb., August 23, 1889.

"Messrs. Crane Bros. Manufacturing Company, City.

Gentlemen: I will guaranty the payment of your account against A. C. Lichtenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me.

"Yours truly,

"C. Specht."

A jury was waived and trial had to the court. There was a finding and judgment in favor of defendant. Plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review.

The evidence in the case discloses that on the 23d day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question (Exhibit "A"); that on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company, no change or alteration whatever being at this time made in the officers, management, business, or location of place of business, and after such change continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger failed to pay; that defendant Specht was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty; that the action is brought upon the account running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new

name, for a balance due upon the account which is due for goods sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions and strenuously argued by counsel is, can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of the same persons, managed by the same officers, engaged in the same business and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to "Crane Company." The contention in the case resolves itself to the question, did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guarantied to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty and the construction to be given to it.

In *Miller v. Stewart*, 9 Wheat. (U. S.) 680, Story, J., says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or even that it may be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass now to some of the cases in which these rules have been particularly applied to the facts as developed in the cases, selecting such as are similar to the one under consideration and more or less directly in point.

In the case of *Allison v. Rutledge*, 5 Yerg. (Tenn.) 194, the defend-

ant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of some bacon purchased by one Cooper, and was sued on the instrument by John and Joseph Allison, as guarantor, for \$100, the price of the bacon. Catron, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutledge undertook for the debt of Cooper, is bound by the writing and this only. The contract cannot be varied or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of *Smith v. Montgomery*, 3 Tex. 199, the defendant Montgomery wrote and forwarded a letter of credit as follows:

Colorado, Dec. 27, 1839.

"Col. Smith & Pilgrim—Gentlemen: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid as far as to the amount of (\$3,000) three thousand dollars,

"And much oblige yours, with respect.

"James S. Montgomery."

This letter was addressed on the back to Smith alone. It appears that Smith and Pilgrim had been partners in business, but a very short time prior to the date of the letter had dissolved the partnership. The letter being addressed on the back to Smith aloné, was delivered to him and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Mr. Justice Wheeler, in delivering the opinion of the court, says "Upon consideration, we are all of the opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from ambiguity, we must take that as the certain criterion to determine its application without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. (1 How., 169.) But when the contract upon its face is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control

the express terms and clear import of the face of the instrument. . . . It is a well settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot be extended by implication or otherwise beyond the actual terms of his engagement. The case must be brought strictly within the terms the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In the case of *Evansville National Bank of Evansville, Ind., v. Kaufmann*, 93 N. Y. 273, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed."

"Guarantor liable only to person to whom he makes the guaranty." (*Second Nat. Bank of Peoria v. Diefendorf*, 90, Ill. 396.)

A guarantor's engagement does not make him answerable for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement. (*Walsh v. Bailie*, 10 Johns. (N. Y.) 179; *Penoyer v. Watson*, 16 Johns. (N. Y. 99.)

"Where a letter of credit is addressed to a particular firm no one else can rely on it as a guaranty." (*Taylor v. Wetmore*, 10 Ohio 491.)

In *Barnes v. Barrow*, 61 N. Y. 39, it being a case in which, under a written contract of guaranty made with a particular person, a partnership of which that person was a member sought to recover the value of goods furnished the person for whose debt or default the guarantor stood charged to answer, it is said: "On the face of this contract it is plain that no one could act upon it, except the persons named in it." And *Burge on Suretyship* (Ch. 3) is cited as follows: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included, in it." And further it is stated: "In the Roman law the rule now under consideration assumes the form of a maxim: 'An agreement of guaranty made with one person cannot be extended to another person.'"

To the same effect as the above cases is that of *Taylor v. McClung's Executor*, 2 Houston (Del.), 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of *Lee v. Hastings*, 13 Neb. 508. . . .

In the case at bar the defendant *Specht* addressed the letter, or

contract of guaranty sued upon, to the Crane Bros. Manufacturing Company, not to the Crane Company. At the time the contract was entered into there was no such corporation in existence as the Crane Company. The contract of guaranty made by Specht was not in any manner for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and when not uncertain, indefinite, or ambiguous, will not be extended in any particular beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation from Crane Bros. Manufacturing Company to Crane Company was made there was no notice given defendant that such change had been made. The change could not and did not pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which under certain circumstances as to assignment, and possibly without, would be a different case and raise another point or question. The instrument containing the guaranty was plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second, and the introduction of the letter, showing as it does the guaranty to the Crane Bros. Manufacturing Company, was not competent to, and does not, support the action of the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that the Crane Company had the same officers, and was, under the same management, engaged in the same business and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action. At the time the goods were furnished to Lichtenberger there was no Crane Bros. Manufacturing Company. It had ceased to exist or had become, by change of name, the Crane Company, and Specht could rely upon the terms of his contract and demand that his rights and liability be measured by the guaranty as written, signed, and delivered by him, to be bound only for goods

furnished to Lichtenberger by the Crane Bros. Manufacturing Company as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right and is affirmed.

A CO-SURETY HAVING PAID THE WHOLE DEBT WILL BE GIVEN JUDGMENT AGAINST THE INSOLVENT ESTATE OF HIS CO-SURETY FOR FULL AMOUNT PAID AND MAY RECEIVE DIVIDENDS TILL HE IS REPAID ONE-HALF OF AMOUNT PAID BY HIM.

PACE v PACE.

95 Va. 792; 30 S. E. Rep. 361; (1898)

Appeal from corporation court of Danville.

Action by James B. Pace against the administrator of John R. Pace's estate to determine his claims as co-surety on a note paid by him. From a judgment granting plaintiff leave to prove for half of his claim, plaintiff appeals. Reversed.

HARRISON, J. The facts of this case, in brief, are that on April 7, 1893, one T. J. Talbott (under the name of Pace, Talbott & Co.), John R. Pace, and James B. Pace made a note for \$16,000, payable to William F. Cheek or order, 120 days after date. T. J. Talbott was the principal in the note, and John R. Pace and James B. Pace co-sureties. T. J. Talbott died in the fall of 1894, entirely insolvent. Prior to his death, to wit, on October 9, 1893, John R. Pace died, leaving an estate not sufficient to pay more than 50 cents on the dollar of his debts. In May, 1894, this suit was brought to administer John R. Pace's estate, and a decree of reference was entered in July, 1894. On the 19th of September, 1895, being pressed by the executors of the creditor, William F. Cheek, James B. Pace took up the note in question by paying \$16,551.57, the entire amount, principal and unpaid interest, to that time. Thereupon James B. Pace tendered proof of these facts to the commissioner in this suit, and claimed to rank in the distribution of John R. Pace's estate for the whole of the debt so paid by him; but the commissioner reported that he could only rank for one-half the debt, and an exception made by James B. Pace on that score was overruled by the court below, to which ruling this appeal was taken.

The contention of the appellee is that J. B. Pace could not rank against the estate of his co-surety for the whole debt when the co-surety only owed him one-half of the debt; in other words, that appellant had no right to prove for the one-half of the debt which he himself was primarily bound to pay.

The question presented is an important one in the administration of insolvent estates, and there is some conflict of opinion in respect thereto. We are, however, satisfied that the view taken by the learned counsel for the appellant is sustained by the best reason and the weight of authority.

In *Enders v. Brune*, 4 Rand. (Va.) 447, Judge Carr, in discussing the doctrine of substitution, says: "It has nothing of form, nothing of technicality, about it; and he who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

The doctrine is well settled that the surety has the right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal; and the rule of substitution for the purpose of enforcing contribution among co-sureties is not different. One surety who pays the common debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the principal debtor. *Robertson v. Trigg*, 32 Grat. 76; *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. (3d Am. Ed.) p. 131, and notes.

In *Ex parte Stokes*, De Gex 618, Stokes, the creditor, held a bond executed by a principal and three sureties. Two of the sureties, Clark and Phillips, became bankrupts, and Stokes, the creditor, proved against their estates. Thereafter the principal debtor compounded with his creditors; and the other surety, Thomas Charles Ord, executed an assignment for the benefit of his. Stokes, the creditor, by dividends, received from the principal debtor, from the estate of Clark, one of the sureties, and from Thomas Charles Ord, realized his whole debt, to the payment whereof the remaining surety, Phillips, contributed nothing. The creditor realized from the estate of Thomas Charles Ord 10s. in the pound, whereas the just proportion payable by each surety was only 4s. 10d. in the pound. Thereupon the assignees of Thomas Charles Ord petitioned for leave to stand in the place of the creditor for his entire debt as against the estate of Phillips, which had paid nothing, so as to realize from that estate its just proportion, viz., 4s. 10d. in the pound. The petition was allowed, Sir J. L. Knight Bruce saying:

"The question then substantially is whether, as between the estates of the two sureties, when (one of them having become bankrupt) the creditor has proved the debt under the fiat, and has afterwards been paid in full, partly by the principal debtor, and partly by the surety, not a bankrupt, the latter has the right to use the proof for the purpose

of obtaining from the bankrupt's estate that amount of contribution which the bankrupt is, or but for the bankruptcy would have been, liable, so far as the proof can furnish means for that end; and I think that he has.

"Where several persons are liable, each in solido, to a debt, the creditor may enforce payment in a manner which, as between the debtors themselves, is unjust. This must sometimes happen; but in such cases is it not the function and the duty of a court of justice, at least of a court of equity, to place them in the same situation, between themselves, as if the creditor had enforced his rights against them in a manner conformable to their rights against each other, so far as it can be done? Generally speaking, the law of this country, as I apprehend, answers that question in the affirmative.

"Now in the present case, had Mr. Stokes regulated his proceeding in such a manner, portion of what he has received from Mr. Thomas Charles Ord's estate would have been taken by Mr. Stokes from Mr. Phillips' estate, if available for the purpose. The mere circumstance that it has not until the present time become practically available for the purpose is, I conceive, nothing.

"This has not been done; but justice requires, I apprehend, that the nearest possible approach to that state of things shall take place, which must, I suppose, be effected by allowing the claim intended to be made by the present petition. Mr. Clark's estate, unless I mistake, has paid 5s. in the pound, but not more; while I collect that Mr. Thomas Charles Ord's estate has paid 10s. in the pound, and Mr. Phillips' estate as yet nothing. . . .

"I repeat that it was originally equitable between these sureties or their estates that the benefit of the proof or some portion of it should go in diminution of Mr. T. Charles Ord's burden; that, in my view, it was not competent to Mr. Stokes, by any election upon his part, to deprive Mr. Thomas Charles Ord's estate of that right; that it could not, I think, be defeated by delays and difficulties occurring in the liquidation or collection of Mr. Phillips' assets; and that the right appears to me substantially to have continued and now to exist."

In the case of *Morgan v. Hill* (1894), 3 Ch. 400, a debt was owing by a principal debtor and five sureties. Nothing could be realized from the principal debtor, or from one of the sureties, and only a very insignificant sum from another of the sureties. So, three of the sureties were left to bear the liability. One of these three made an assignment, which, after the payment of specified prior claims, provided for the payment of his remaining debts ratably. The creditor presented his claim for payment to the trustees in the assignment, but, before the

trustees paid anything thereon, the debt was paid by the other two sureties, who subsequently, also took from the creditor an assignment of his debt and securities. These two sureties then claimed the right to receive a dividend from the assigned estate of their co-surety on the whole amount of the debt paid by them, until they had received one-third thereof, that being the just proportion payable by each surety; and this claim was allowed by Kekewich, J., and on appeal his order was affirmed.

KEKEWICK, J., who decided the case in the lower court, said: "Two out of three sureties paid the whole debt, and, having so done, they are entitled to stand in the shoes of the creditor whose whole debt they have paid. That would seem to be according to natural justice; but, whether it be so or not, at all events it is strictly in accordance with the provisions of the mercantile law amendment act of 1856 (19 & 20 Vict. c. 97).

"A surety in such case is to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name, of the creditor in any action to obtain indemnification."

The reference of the learned judge to the mercantile law amendment act, as justifying his conclusion, if not justified by its conformity to "natural justice," is a circumstance that does not detract from the weight of this case as an authority in this state, because that act was passed to do away with the doctrine laid down in *Copis v. Middleton*, which was disapproved by this court in *Powell's Ex'rs v. White*, 11 Leigh, 309, in a learned opinion by Judge Tucker, and the act referred to simply declared the law in England to be what it had theretofore been under our decisions.

In *Hess's Estate*, 69 Pa. St. 272, the precise question involved here was presented, and the supreme court of Pennsylvania held that the surety paying the debt, after the death of his co-surety, was entitled to prove against his estate for the entire amount of the debt. The court says:

"The debts paid by Christian Lintner, and transferred to him, stand exactly in the same position to the assets of the decedent, Henry Hess, as if presented by the creditors themselves; their status being fixed by his death, and nothing having occurred to change or reduce the amount. So far as they existed as debts payable out of the estate, no part of them is paid or extinguished, for the effect of subrogation is to consider them in full life, and enjoying all the rights of the original creditors."

"We regard the administrators of the decedent as trustees, and the creditors as *cestuis que trustent*, owners of their share of the assets,

and which, applying the principle in *Miller's Appeal*, 35 Pa. St. 481, and *Patten's Appeal*, 45 Pa. St. 151, passed to the co-surety, who stepped into their shoes when he paid the amount due on such claims."

In the case of *Miller's Appeal*, 35 Pa. St. 481, an insolvent debtor had executed a general assignment for the benefit of all his creditors. Subsequently, the assignor became entitled to a legacy which was attached by one of the creditors; and from that attachment he realized a portion of his debt. It was held that such creditor was, notwithstanding, entitled to a dividend of the assigned estate on the whole amount of his claim as it stood at the time the assignment was made.

In this case, Judge Strong (afterwards of the supreme court of the United States) said: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors; and each creditor owned such a proportionate part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made It amounts to very little to argue that *Miller's* recovery of the legacy operated with precisely the same effect as if voluntary payment had been made by the assignor after the assignment; that is, that it extinguished the debt to the amount recovered. No doubt, it did. But it is not as creditor that he is entitled to the distributive share of the trust fund. His rights are those of an owner, by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the question of his ownership. The reduction of that debt, therefore, after creation of the trust, and after his ownership had become fixed, it would seem, must be immaterial."

There are many cases holding that where a creditor of an insolvent person, who is dead, or has made an assignment for the general benefit of creditors, holds collateral security for his debt, and, after the death or the assignment of his debtor, realizes on the collaterals, he may, notwithstanding, prove against the decedent's estate or the assigned estate for the full amount of his debt as it stood at that time of the death or assignment. The grounds upon which these cases proceed are ably set forth in the opinion of Judge Taft in *Bank v. Armstrong*, 59 Fed. 380, 8 C. C. A. 163, in which he reviews all the authorities.

The only case involving the question here presented, cited by appellee, is that of *Institution v. Hathaway*, 134 Mass. 69. In this case the holder of a note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another surety, and then

assigned the note with his claim against the estate of the solvent surety, who paid the holder in full. The court held that this amounted to a payment of the note, ordered the proof to be expunged, and only allowed the surety to prove one-half of the claim. In this conclusion we cannot concur. There are three authorities cited in its support, which are not in our judgment, entitled to the weight given them. The one chiefly relied on is *Maxwell v. Heron*, a Scotch case, which, if applicable, has been overruled in England, and the law there settled, as we have seen, to the contrary.

It further appears that the decisions of the Massachusetts court upon analogous questions have not been in accord with the views of this and other courts upon like questions.

An important, if not vital, objection to the Massachusetts view of this question, is that the rights of the surety, instead of being fixed and certain, are made to depend upon accident or upon the caprice of the creditor. It encourages a policy of obstruction in the administration of estate; for, if those interested in the insolvent estate can delay its settlement until the creditor demands his debt from the solvent surety, they reap the advantage by having a smaller debt to share with them in its distribution. On the other hand, temptation is held out for a corresponding effort on the part of the solvent surety to avoid paying, until the creditor has received such dividends as the insolvent estate will pay, because the amount for which he is liable is thereby reduced. It gives opportunity to the creditor, by collusion or otherwise, to further the interest of one surety at the expense of the just and equal rights of the co-surety.

Results like these, which depend, not upon the rights of the parties fixed by law, but upon the superior skill of one over the other in maneuvering for position, or upon the will and caprice of the creditor, or upon mere accident, cannot be founded upon sound principles.

In *Watts v. Kinney*, 3 Leigh, 272, Judge Tucker, speaking for this court, says: The surety, in paying the debt, "is governed by the law of this court. Even on entering into his engagement as surety he looks to its well-established principles. He knows, if he pays the debt to the obligee, he will stand in the obligee's shoes. He knows he will be subrogated to all the rights of the obligee, as they subsist at the time he makes his payment. He knows that a court of equity looks not to form, but to substance; that it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment shall be so applied, whosoever may be the person entitled; and that it considers a debt as never discharged until it is discharged by payment to the proper person, and by the proper person.

He knows that that court, which permits no act of a trustee to prejudice the cestui que trust, will not permit one who stands in the relation of the creditor or obligee to the surety to bar him of those rights which the principles of equity have secured to him. He is conscious that his rights do not depend upon the caprice of the creditor, or the whim of an executor, or the sense of right of other creditors, but rest upon the immutable principles of justice and equity; and, in making his payment, he does it in the confidence that he will be entitled to be indemnified to the full amount to which this creditor could have charged the assets of the principal."

These considerations bring us, in the case at bar, to the conclusion that John R. Pace's estate and James B. Pace were each bond in solido to their common creditor William F. Cheek for the entire amount of the debt in question; that, at the death of John R. Pace, the rights of his creditors became fixed, the assets of the state passing, as a trust fund, into the hands of his representatives charged with the payment of his debts; that, subject to costs of administration and preferred debts, William F. Cheek then became entitled to an interest in said estate, not then ascertained, but capable of being made certain, bearing such proportion to the entire assets as his debt bore to the entire indebtedness; that when James B. Pace, the surety, paid his debt, he became at once subrogated to all the rights, remedies, and means of payment, in respect thereto, that were possessed by the creditor, and had the right to prove, as the creditor could have done, the entire debt against the estate of his co-surety of John R. Pace, and to receive dividends upon the basis of the entire debt until reimbursed that half of the common burden belonging to the co-surety. This conclusion works no injustice to the other creditors of John R. Pace. Their rights, which become fixed at the death of the debtor, remain unimpaired. They had no interest in that proportion of the assets belonging to William F. Cheek. That interest was as distinct and separate from theirs as if it had been already segregated and set apart for the benefit of William F. Cheek. They could not add to or take from it while it was the property of Cheek; nor can they do so now that it stands, in equity, as indemnity for the surety who has paid it.

For these reasons, the decree appealed from must be reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion.

CARDWELL, J., absent. BUCHANAN, J. Absent, interested in case involving same question.

BAILMENTS

A SALE ON CONDITION DISTINGUISHED FROM A BAILMENT

KRAUSE V. COMMONWEALTH

93 Pa. St. 418 (1880)

Conviction of larceny. The indictment contained two counts: 1. Larceny; 2. Larceny by bailee. Upon a plea of former acquittal on the first count there was trial and conviction on the second. It appeared that defendant agreed to purchase of one Deemer two horses for \$150, to be paid on delivery. They were delivered, but as defendant had only \$25 they were not paid for, and it was agreed that the defendant should pay the \$25, keep the horses, and have until the following Tuesday to pay the balance or return the horses, the title meantime to remain in Deemer. Krause did not pay on Tuesday. On the following Thursday the horses disappeared, having been sold, or converted by Krause to his own use. Deemer offered to return the \$25 and demanded his horses, but Krause refused to deliver them back.

TURNKEY, J. . . . Having acquitted the defendant of larceny of the horses, the Commonwealth put him to another trial and convicted him of larceny, in stealing the same horses, under section 108 of the Crimes Act of 1860. Villainous as his conduct was, this conviction ought not to stand, unless he was a bailee within the intendment of the act. The word "bailee" is a legal term, to be understood in its generally accepted sense among jurists, and if it be doubtful whether a case be included it shall be excluded, in the construction of a criminal statute. Blackstone defines bailment as "a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee;" Story, "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust;" Jones, "a delivery of goods in trust on a contract, express or implied, that the trust shall be duly executed, and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed or be performed;" and Kent, "a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored to

the bailee, as soon as the purpose of the bailment shall be answered." Mr. Edwards, in his work on Bailment, § 2, remarks: These definitions agree in nearly all essential particulars, and disagree in two or three respects. Jones and Kent assume the property is to be returned, while Blackstone and Story include contracts under which no such return is contemplated. Story intends to include among contracts of bailment a delivery of goods for sale; and Kent intentionally limits his definition so as to exclude that species of contract. "In general terms it may be said that the delivery of goods or any other species of personal estate for use, keeping, or on some other trust, where the general property does not pass, creates a bailment. A delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase-money at a future day, is something more than a bailment; it gives the buyer a conditional title. If the contract give the buyer a definite credit or a reasonable time within which to pay, it gives him a transferable interest in the chattels until the credit expires, and the property in them as soon as he pays the price."

Authors of received authority generally specify five sorts of bailment, namely depositum, mandatum, commodatum, pledge and hiring: and as severally defined, in each the entire property of the thing bailed remains in the bailor, the possession only is given to the bailee, who is to return or deliver the thing itself as soon as the purpose of the bailment shall be answered. In this state it is settled that the bailee of goods, who uses and enjoys them as if his own, cannot divest the title of the bailor by a sale to an innocent person; nor can a creditor of the bailee seize them in execution of his debt. When delivered under a contract of bailment, the owner will be entitled to them against everybody. But a delivery on a conditional sale, the property to remain in the vendor until the goods are paid for, with right to reclaim them, is void as respects the vendee's creditors, or an innocent purchaser from him. The delivery being on the foot of a purchase, the vendor's right, as against the vendee's creditors, is regarded as a lien for the purchase-money. *Chamberlain v. Smith*, 44 Penn. St. 431; *Haak v. Linderman*, 64 Penn. St. 499; 3 Am. Rep. 612. By the terms of the contract the seller may retain the right of property in the goods till paid for, as against the purchaser, and in default of payment, he may reclaim them, or use civil remedies for recovery of possession; but the contract does not make him a bailor, as respects other persons, nor the purchaser a bailee in the sense of the word as used in the statute.

Our statute, as shown by Read, J., in *Commonwealth v. Chatham*, 50 Penn. St. 181, is taken from the English statute; and in that case the interpretation of the words "bailee" and "bailment," as fixed by

the English decisions, was adopted, which decisions were cited, showing that the words must be interpreted according to their ordinary legal acceptation, that "bailment relates to something in the hands of the bailee, which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under any obligation to return it in precisely the identical coins which he originally received;" that "to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved: First: That there was such a delivery of the property as to divest the owner of the possession, and vest it in the prisoner for some time; Secondly: That at the expiration or determination of that time the same identical property was to be restored to the owner."

The term "bailee" is one to be used, not in its large but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods bona fide, and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statutes is not constituted. Whart. Crim. Law, § 1855 (8th ed).

The bargain was struck for a sale of the horses for \$150, payable on delivery. At the time stipulated Deemer delivered the horses, Krause paid \$25, they agreed that the property should continue in Deemer, and on the next Tuesday Krause would pay the balance or return the horses. He refused to do either. The original contract was not changed—time was extended to Krause to enable him to pay the money. If there was a delivery at all, it was on the footing of the sale. There was no agreement to sell at a future time—a mere contract that the buyer would pay the balance of the price or return the property, in the meantime the title to be in the seller. Payment would have been a complete performance. Krause was not bound to return the identical property. He had a transferable interest until the credit expired, and he or his transferee would have had clear title the instant of payment. This was something more than a bailment, and Krause was not a bailee in the statutory sense.

In favor of the liberty of the citizen, the court may, and in a proper case should, declare the evidence insufficient to convict. *Pauli v. Commonwealth*, 89 Penn. St. 432. We are of opinion that the defendant's first point should have been affirmed.

Judgment reversed, and the record, with this opinion setting forth the causes of reversal, is remanded to the Court of Quarter Sessions of Lehigh county for further proceeding.

Judgment accordingly.

A GRATUITOUS BAILOR IS LIABLE ONLY FOR GROSS NEGLIGENCE

KNOWLES V. ATLANTIC AND ST. LAWRENCE RAILROAD CO.

38 Me. 55 (1854)

Action to recover for the loss of sixteen tons of hay.

By Court, RICE, J. The evidence in the case shows that the original contract of the defendants, as common carriers, was fully executed to the satisfaction of the plaintiff. Howe, the forwarding agent of the railroad company, in his deposition states that "I told Mr. Knowles that the hay was now delivered in good order; that that was an end of our contract, and that it must now be at his risk against any damage. He replied that he acknowledged he received it in good order." The defendants, therefore, clearly are not liable as common carriers. The case provides that if, in the opinion of the court, the plaintiff is entitled to recover in any form of declaring, the defendants are to be defaulted. It is contended that they are liable as bailees or depositaries. The hay was permitted to remain upon the defendants' cars for the accommodation of the plaintiff, and at his special request. For this the defendant received no additional compensation nor consideration. At most, therefore, they were naked bailees or gratuitous depositaries.

The defendants contend that there was no responsibility upon them; that the whole risk of loss or damage to the hay was assumed by the plaintiff. Mr. Hamlin, who acted as agent for the plaintiff, testified that "Mr. Howe consented that the hay might remain on the cars (until it could be shipped), with the understanding that the whole risk should be on Mr. Knowles. Mr. Knowles asked at the time, 'Is there any risk?' or something like that. I told Mr. Knowles, Howe being present at the time, that there was a risk; that there was a risk in all cases. He asked, 'What risk?' I told him there was the risk of fire and water or rain; and there were other risks which could not then be thought of—there were a thousand risks. After a little more conversation it finally ended in Mr. Knowles assuming the whole risk

This witness further testified that the cars on which the hay then was were on the principal track, from which they must be removed to make room for other trains. The track down on the wharf, and the one where the cars then stood, were the only tracks from which freight could be shipped.

This was on the sixteenth of July, 1851. On the eighteenth of the same July, the cars on which the plaintiff's hay was transported, having been removed, but under whose direction does not appear, to the de-

fendants' wharf, were precipitated into the dock by the breaking down of the wharf, in consequence of its being overloaded with railroad iron. This risk, the plaintiff affirms, was not contemplated by the parties, nor assumed by him, but was the consequence of the gross negligence of the defendants, and therefore they should sustain the loss. Being a bailee without reward, the defendants are bound to slight diligence only, and are not therefore answerable except for gross neglect: *Story on Bailments*, sec. 62; *Foster v. Essex Bank*, 17 Mass. 500 (9 Am. Dec. 168). The authorities do not concur in a uniform standard by which to determine what constitutes gross negligence in a gratuitous bailee or depositary. Such a bailee, who receives goods to keep gratis, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them. He is only answerable for fraud, or that gross neglect which is evidence of fraud: *Just. Inst.*, lib. 3, tit. 15, sec. 3; *Coggs. v. Bernard*, 2 Ld. Raym. 909, 914; *Foster v. Essex Bank*. *supra*; 2 *Kent's Com.* 561, 562.

Judge Story, in his work on bailments, section 64, says: "The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual; but it looks to the general conduct and character of a whole class of persons; and so Sir William Jones has intimated on some occasions." He cites Jones on *Bailments*, 82, 83; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Doorman v. Jenkins*, 2 Ad. & El. 256.

Both of the above rules, which on a strict analysis will not be found in any essential point dissimilar, are subject, under some circumstances, to modification. Thus when the bailor or depositor not only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent, in advance, that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have entrusted them with such a depositary, to be kept in such a manner and place. Applying these principles to the case under consideration, and whatever view we may take of the extent of the plaintiff's liability by reason of his special contract, the result can not be doubtful. That it was the expectation of both parties that the hay was to be shipped from the defendants' wharf is very apparent. That wharf was open to the inspection of the world. The plaintiff had the same opportunity

to observe its conditions as the defendant. The iron by which it was ultimately carried down had been deposited upon it months before. No additional incumbrance appears to have been placed upon the wharf by the defendants after the arrival of the hay before it finally broke down.

In view of all the facts in the case, and independent of the special contract testified to by Mr. Hamlin, we are of opinion that the defendants are not liable. Therefore, according to agreement, a non-suit must be entered.

THE FACT THAT A BAILEE UNINTENTIONALLY TOOK A WRONG ROAD AND TRAVELED FIVE OR SIX MILES MORE THAN NECESSARY BEFORE HE DISCOVERED THE MISTAKE, WILL NOT AMOUNT TO A CONVERSION

SPoonER v. MANCHESTER

133 Mass. 270 (1882)

Trover for a hired horse. Judgment for plaintiff below.

FIELD, J. This case apparently falls within the decision in *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when after traveling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but in action in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when as in this case the property has been returned to and received by the owner by the value of the property at the time it was

returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him by relation as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroy the property," and the authorities are there cited. *Fouldes v. Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*, 8 Exch. 431; *Wilson v. McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*, 8 Metc. 548, a cow going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and *Loring v. Mulcahy*, 3 Allen, 575, were both decided upon the ground that the defendant either assumed to dispose of the property as his own, or intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*, 9 Allen, 171, 85 Am. D. 749, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *ubi supra*; *Wilson v. McLaughlin*, *ubi supra*; *Nelson v. Merriam*, 4 Pick. 249; *Houghton v. Butler*, 4 T. R. 364; *Heald v. Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There

is no evidence that the defendant was not at all times intending to return the horse to the plaintiff according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV, 75, pl. 9.

Exceptions sustained.

WHERE A BAILEE WILLFULLY AND INTENTIONALLY
DRIVES A HORSE AT SUCH AN IMMODERATE RATE OF
SPEED AS TO SERIOUSLY ENDANGER ITS LIFE, THE
BAILOR MAY TREAT THE ACT AS A CONVERSION AND
MAINTAIN AN ACTION OF TROVER

WENTWORTH V. McDUFFIE

48 N. H. 402 (1869)

Trover for a horse. The jury found that plaintiff hired a horse and buggy to defendant to drive from Rochester to Dover. Defendant drove the mare to Hoit's, two miles away from the journey agreed upon, and drove her immoderately on a very hot day, so that when she returned to plaintiff's stable she was exhausted and sick, and in about half an hour died. Verdict for plaintiff.

SMITH, J. (Omitting a question of evidence.) Taking into account the nature of the evidence on which the plaintiff relied, the gist of the instructions excepted to would seem to be contained in the last clause, and we are not inclined to think that the jury were misled by the remarks which preceded that clause.

The jury were instructed that "if the defendant willfully and intentionally drove the mare at such an immoderate and violent rate of speed as seriously to endanger her life, and he was at the same time aware of the danger, and her death was caused thereby, it would be such a tortious act as would amount to a conversion, and trover might be maintained; though it would be otherwise if the fast driving was the result of mere

negligence and want of discretion, he not being aware that it endangered the safety or life of the mare."

Two established principles of the law of trover tend to support this instruction. The first is the settled rule in this State, that if the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer. *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. D. 310. This doctrine does not seem to proceed upon the idea that the driving the horse beyond the place named in the contract is conclusive evidence of the bailee's intention to convert the animal to his own use, but rather upon the ground that such use of the property is so substantial an invasion of the owner's rights, and so inconsistent with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby or to his proceeding against the bailee for a conversion. "A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property;" *Perley, J.*, 25 N. H., p. 71. It has been said that, "if the thing be put to a different use from that for which it was bailed," the bailor may maintain trespass or trover, but that "any misuse or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee;" *Redfield, J.*, in *Switt v. Mosely*, 10 Vermont 208, p. 210, 33 Am. D. 197. But we are unable to perceive any just ground for the distinction as stated in these broad terms. If a horse is hired upon the usual implied contract that he is to be driven at a safe rate of speed, the act of the bailee in willfully and intentionally driving the horse at such an immoderate rate of speed as he knew would seriously endanger the life of the horse is at least as marked an assumption of ownership and as substantial an invasion of the bailor's right of property as the act of driving the horse at a moderate speed one mile beyond the place named in the contract of hiring. The probability of injury to the horse is much greater in the former case, and the cruel treatment of the horse is certainly as inconsistent with the continued existence of the contract of bailment as the use of the horse for a different journey.

The other established principle which tends to support this instruction is the doctrine that the willful destruction by the bailee of the thing bailed is a conversion; see *Morse v. Crawford*, 17 Vermont 499, 44 Am. D. 349. If the death of the mare was caused by an act willfully and intentionally done by the bailee with knowledge on his part that the life of the mare was thereby seriously endangered, we think that, so far as the civil remedy is concerned, the bailee may be regarded as having

willfully destroyed the mare. If the property is destroyed by the bailee's willful act the bailor's right to maintain trover cannot depend upon the time when the destruction is consummated. "It can make no difference whether the destruction takes place immediately on the commission of the act, or is the necessary result of it." If the bailor had seen that his mare was about to be destroyed by the bailee's willful act he would have been entitled to terminate the bailment, and retake his property if he could do it without force. When the bailor learns that an act has already been done which will result in the death of the mare, can he not elect to consider the bailment as having been rescinded by the act at the moment of its commission?

It may be urged that the principles referred to as sustaining the instructions are themselves arbitrary exceptions engrafted on the law of trover, and that they therefore do not furnish a foundation upon which to reason from analogy. If we are to look merely to the form of the declaration, very few of the actions of trover now brought would be sustained. The legal fictions which prevail in reference to trover are based upon authority; and however arbitrary the established principles may be, we know of no other test by which to decide any question pertaining to the form of action which has not already been conclusively settled by authority.

The right of a bailor to maintain trespass or trover against a bailee in a case like that supposed in the instructions is a question not conclusively settled by authorities directly in point. *Rotch v. Hawes*, 12 Pick. 136, 22 Am. D. 414, seems favorable to the defendant. *McNeill v. Brooks* 1 Yerger 73, is cited on the same side, but an examination of the opinion shows that the court did not have in mind such a willful and intentional misuse as that described in the instructions given in the present case. *Swift v. Moseley*, 10 Vermont 208, 33 Am. D. 197, contains a dictum favorable to the defendant, but the case itself, is not in point; see also *Harris, J., in Parker v. Thompson*, 5 Sneed 349, p. 352. On the other hand *Maguyer v. Hawthorn*, 2 Harrington 71, tends to sustain the plaintiff as do also *Campbell v. Stakes*, 2 Wend. 137, 19 Am. D. 561; and *Nelson v. Bondurant*, 26 Ala. 341, reaffirmed in *Hall v. Goodson*, 32 Ala. 277: see also *James v. Carper*, 4 Sneed 397.

We think the instructions were correct.

Judgment on the verdict.

WHERE AN OWNER HIRED A HORSE TO D, AND IT BECAME SICK AND D PLACED IT IN THE HANDS OF L TO FEED AND CARE FOR, THE OWNER IS LIABLE FOR THE EXPENSES INCURRED BY L IN CARING FOR THE HORSE

LEACH V. FRENCH

69 Me. 389 (1879)

Assumpsit for board, keeping and burial of a horse.

BARROWS, J. The case, as stated in the report, is that the defendant owned the horse, for the board and keeping of which while sick, and the expense of its removal when dead, plaintiff brings this action, under the following circumstances:

Defendant let the horse to one Devereux. The horse became diseased and sick while thus let, and Devereux left him with the plaintiff for care and cure. While plaintiff was keeping the horse defendant wrote him informing him that he (defendant) owned the horse and inquiring about its condition, and saying that an uncle of Devereux would pay the bill. After the horse died plaintiff's attorney wrote defendant demanding payment of the bill. Defendant answered, "Please not make any costs on it (the bill) as I will call and settle the same soon." Plaintiff's attorney thereupon wrote defendant saying he would wait. After waiting awhile, in pursuance of this arrangement, payment not being made, this suit was brought. Defendant denies his liability to pay for the expenses of his horse thus incurred, and contends that there was no valid consideration for his express promise to do it. Unless there was an original liability on his part by reason of the circumstances and acts of the parties while the plaintiff was furnishing the care and board of the horse, it may well be doubted whether a valid consideration is shown for the promise in defendant's letter to the attorney.

We do not find it necessary to decide that question, for as the case is stated, we think, upon natural and legal presumptions, it is made to appear the plaintiff might well charge the keeping of the horse to its owner, and the defendant would be liable for the bill without any express promise.

The first inquiry is, what were the respective rights and duties of the defendant and Devereux under the circumstances disclosed?

"If a man hires a horse," remarks Lumpkin, J., in *Mayor of Columbus v. Howard*, 6 Ga. 213, "he is bound to ride it moderately and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer

he is not responsible to the owner for the consequences. The owner of the animal must bear them.

But if the horse falls sick or becomes exhausted the hirer is bound not to use it. And if he does pursue his journey and use it when reasonable care and attention would forbid, he would make himself responsible to the owner for that act. *Bray v. Mayne, Gow. 1* (5 E. C. L. 437).

On the other hand, one who lets a horse impliedly undertakes that the animal shall be capable of performing the journey for which he is let, and if without the fault of the hirer he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services. *Harrington v. Snyder, 3 Barb. 380.*

Upon whom, then, as between Devereux and the defendant, should the expense of keeping and caring for the defendant's horse, which "became diseased and sick while in Devereux's hands," fall? Up to the time when he fell sick it was Devereux's business to furnish him at his own proper expense with "meat for his work." But how was it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of Devereux, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal—an expense which enures directly to his benefit. There would be good reason for holding that in such case the hirer is, *ex necessitate*, the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still, if instead of applying to a farrier, he undertakes to prescribe for the beast himself, and by his unskillfulness does it a mischief, he assumes a new degree of responsibility, and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse. *Deane v. Keate, 3 Camp. 4.*

But it is unnecessary in this case to determine the extent of the hirer's authority as agent for the owner, for the report shows that while plaintiff was keeping the horse defendant wrote to him mentioning his ownership and inquiring as to the condition of the animal. Since he thus knowingly availed himself of the plaintiff's services and outlay in the premises, the law will imply a promise on his part to do what was right and pay the plaintiff for them. Nor could the fact that he gave the plaintiff an assurance that Devereux's uncle, who was certainly under no legal obligation

so to do, would pay the bill, make any difference with regard to plaintiff's right to charge the keeping of the horse to its owner who knew he was keeping it. "The horse became diseased and sick while in Devereux's hands." There is nothing here to show that it was by the fault of Devereux. The language used rather indicates the contrary, and "the legal presumption is against it. Negligence and misdoing are not to be presumed, but there must be some positive evidence of them. *Cooper v. Barton*, 3 Camp. 5; *Tobin v. Murison*, 9 Jur. 907. It is not enough to show that the horse became disabled, but he must show that he became so by the fault of the hirer. *Harrington v. Snyder*, *ubi supra*.

It is not the case of property, while in the possession of a bailee for hire, receiving an injury, which could not ordinarily occur without negligence on the part of the custodian, when it would be for him to show that the injury was not caused by his negligence. *Collins v. Bennett*, 46 N. Y. 490.

We think the case as stated shows a good consideration for an implied promise on the part of defendant to reimburse the plaintiff for his outlay in defendant's behalf. Hence, perhaps, defendant's readiness to promise payment if he could have a little delay.

Defendant defaulted.

WHEN A BAILEE RECEIVES PROPERTY BY VIRTUE OF A
BAILMENT, HE ADMITS THE RIGHT OF PROPERTY IN
THE BAILOR, AND MUST RETURN THE PROPERTY

PULLIAM V. BURLINGAME

81 Mo. 11 (1883)

MARTIN, C. The plaintiff brought an action of replevin in the Circuit Court for the recovery of two mules, alleging that he was "the owner of, and entitled to the immediate possession of" the same. The defendant in answer made a general denial of the facts alleged in the petition. The case was tried by the court, a jury being waived by the parties.

Plaintiff offered testimony tending to prove that he was the owner and in possession of the mules in controversy; that about the month of February, 1880, defendant borrowed said mules from plaintiff, but said nothing then about his wife's interest in or claim to same. That defendant held said mules, until they were taken out of his possession under the writ in this cause.

The defendant then offered, and the court heard testimony tending to show that Martha E. Burlingame was the sister of plaintiff, and wife

of defendant; that she owned jointly with plaintiff an undivided half interest in said mules at the time they were borrowed by her husband, and also at the time they were taken from defendant under the writ aforesaid. Defendant also introduced evidence showing that he was in possession of said mules at the time they were replevied in this cause, as the agent of his wife; that he was simply holding the same with and for his wife, by reason of her half interest aforesaid. This was all the testimony offered.

The court, at the instance of plaintiff, declared the law as follows:

"If the court, sitting as a jury, believe from the evidence that the defendant borrowed the mules from the plaintiff and refused to return them to him when so requested, the court will find the right of possession in the plaintiff."

The defendant requested the court, which the latter refused to do, to declare the law as follows:

"If the court, sitting as a jury, believe from the evidence that at the time of the service of the writ herein, said defendant was the husband of one Martha E. Burlingame; that said Martha E. Burlingame was, at said date, the joint owner, with plaintiff, of the mules in controversy, and that said defendant was in possession of, and holding the same with and for his wife, then the court should find the issue for defendant."

The court found the issues for the plaintiff, and rendered its judgment in due form accordingly.

(Omitting minor point.)

The next inquiry is, whether the defendant could make this defense of paramount title in his wife, in face of the contract of bailment by which he acquired possession of the mules.

The admitted evidence in the case is, that he borrowed them from the plaintiff, and that at the time he so borrowed and received them, he made no mention of any claim in favor of himself or his wife. I have examined this question with a scrutiny which has not been confined to the briefs of counsel, and I am unable to reach any other conclusion than that the defendant is estopped from making the defense by reason of the contract under which he acquired possession of the property in dispute from the plaintiff. In borrowing the mules he became a bailee of them like any other borrower. There being no time fixed for a termination of the bailment, that time could be indicated at any moment by the bailor. It was determinable at his option, and when so terminated, it was the duty of the bailee to return the property bailed to the bailor. The contract of bailment necessarily admits the right of property in the bailor, and the obligation to return it to him at the termination of the term of bailment. In other words, a bailee, when he receives the

property by virtue of the bailment, legally admits the right of the bailor to make the contract of bailment. After this subservient relation of the defendant to the plaintiff in respect to the property was established, the law forbids him to dispute the title of plaintiff. The relation is analogous to that which exists between landlord and tenant, a relation which prevents the tenant from settling up against his landlord, either an outstanding or self-acquired adverse title; and from attorning to a stranger without the consent of his landlord, or in pursuance of a judgment or sale under execution or deed of trust, or forfeiture under mortgage. *Stagg v. Eureka Tanny, etc., Co.*, 56 Mo. 317; R. S. 1879, § 3080; *McCartney v. Auer*, 50 Mo. 395. This rule does not prevent the tenant from showing that the landlord has parted with his title, for such fact would not be inconsistent with the title admitted by the demise. *Higgins v. Turner*, 61 Mo. 249.

In pursuing the analogy of these principles in the law of real estate, Mr. Edwards, in his work on Bailment, says: "The law always aids the true owner to recover his property; and it is a general rule that the bailee cannot dispute the title of his bailor. When therefore the bailee is applied to for the property by a third party claiming title, his prudent course is, to leave the claimant to his action, and at once notify his bailor of the suit; he is not obliged to bear the burden of a litigation; and it is not safe for him to surrender the property on demand. For nothing will excuse a bailee from the duty to restore the property to his bailor, except he show that it was taken from him by due process of law, or by a person having the paramount title, or that the title of his bailor has terminated." *Edwards Bailments* (2d Ed.), § 73; *Welles v. Thornton*, 45 Barb. 390; *Bates v. Stanton*, 1 Duer 79; *Blivin v. R. Co.*, 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Aubery v. Fiske*, 36 N. Y. 47; *McKay v. Draper*, 27 N. Y. 256; *Sinclair v. Murphy*, 14 Mich. 392; *Osgood v. Nichols*, 5 Gray. 420; *The Idaho*, 93 U. S. 575.

Mr. Bigelow, in his work on estoppel, says: "The relation between bailor and bailee is analogous to that of landlord and tenant. Until something equivalent to title paramount has been asserted against a bailee, he will be estopped to deny the title of his bailor to the goods intrusted to him." *Bigelow Estoppel* (3d ed.), 430. The principle upon which he can relieve himself from the obligation to return the goods is ably discussed by Justice Strong in the "Idaho" case, 93 U. S. 575, wherein he announces the doctrine, that an actual delivery of the goods by the bailee to the true owner, upon his demand for them, will constitute a valid defense against the claim of the bailor. The same principle was applied by this court in the case of *Matheny v. Mason*, 73 Mo. 677;

39 Am. Rep. 541, which was a suit between vendor and vendee for the consideration money of the goods sold. The subject was ably and elaborately considered by Judge Ray, who rendered the opinion of the Court. The vendor was suing for the price of corn sold, with implied warranty of title, and the vendee, in his answer, after admitting the sale and consideration price, pleaded that at the time of the sale he supposed the vendor was the owner of the corn; that after the sale and delivery, he learned that it belonged to a third party, named in the plea; that said third party demanded of him payment for the same, and threatened suit if he refused; that thereupon he paid the full value thereof to said claimant, who was the true owner. It was also added, that the vendor was insolvent. This plea was held sufficient to rebut and overthrow the estoppel imposed on a vendee from denying the title of his vendor when called upon for the purchase-money. In the opinion significance was given to the facts, that the paramount title came first to the knowledge of the vendee after the sale; that said title was asserted by threats of suit; and that the money was actually paid over to the claimant before suit by the vendor. Now, if it requires such a defense to relieve the estoppel imposed upon a vendee, a fortiori the same, or an equivalent, will be necessary in the case of a bailee. It has long been settled in this State that the relation of a vendor and vendee, as to real estate, is antagonistic, and that the vendee is not estopped from setting up an outstanding or after-acquired title. *Wilcox v. Osborne*, 77 Mo. 621. The estoppel between them is recognized only in respect to the purchase-money. In a suit for it, the vendor is estopped from pleading want of title in the vendor, as long as he retains possession of the land. *Mitchell v. McMullen*. 59 Mo. 252; *Harvey v. Morris*, 63 Mo. 475; *Wheeler v. Standley*, 50 Mo. 509.

The relation of bailor and bailee is not antagonistic in any respect, or at any time. By accepting the property, he not only admits the bailor's title, but he assumes, with respect to the thing bailed, a position of trust and confidence, which continues till it is returned or lawfully accounted for. Measured by these principles, the defendant's evidence must fail to excuse him from the obligation to return the borrowed property found in his possession at the time of the replevin. It does not appear that his wife, as paramount claimant, ever asserted any title to this property. Consequently his plea that he holds it as agent for his wife, as paramount claimant, implies that this is his voluntary act, and was not forced upon him by the assertion in any form of her pretended title. It will not do for a bailee to hunt up a paramount claimant, and then when called upon by the bailor for the property, answer that he is now the voluntary bailee of such claimant. It must be apparent

that this would enable him to enjoy the property by pretending to hold it for another. Justice Strong in the "Idaho" case remarks, "a bailee cannot avail himself of the title of a third person (though the person be the true owner) for the purpose of keeping the property for himself, not in any case where he has not yielded to the paramount title." 93 U. S. 575.

The evidence in this case shows that the defendant, at the time of the replevin, was in actual possession of the mules which he borrowed, and that his plea of being the agent or bailee of a paramount owner rests upon his voluntary act alone, without suit, threat or demand of such owner or claimant.

Although the cases in which the doctrine of *jus tertii* is defined and enforced are somewhat conflicting, I am not aware of any well-considered expression which goes to the length of justifying the defense, as it appears in the evidence and instructions of this case.

Accordingly I am of the opinion that the court did not err in refusing it, or in giving the one asked by plaintiff. The judgment should be affirmed, and it is so ordered.

Judgment affirmed.

All concur.

**A BAILEE HAS THE RIGHT TO RECOVER DAMAGES FROM
ONE WHO INJURES THE PROPERTY WHILE
IN THE BAILEE'S POSSESSION**

LITTLE V. FOSSETT

34 Me. 545 (1852)

Trespass for damages to a hired wagon and harness, injured by negligence of defendant in driving against the wagon on the highway. The court below refused an instruction that one having a mere temporary possession could not sue for a permanent injury. Exceptions to such refusal. Verdict for plaintiff.

By Court, APPLETON, J. The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. The longer or shorter period of such bailment, the greater or lesser amount of compensation—and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan does not seem to affect the question. "The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer." 2 Kent's

Com. 574. By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right: Story on Bail, sec. 394. In *Croft v. Alison*, 4 Barn. & Ald. 590, the court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In *Nicolls v. Bastard*, 2 Crompt. M. & R. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee's possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. "If," Say the court, in *White v. Webb*, 15 Conn. 302, "the suit is brought by a bailee or special propertyman against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of authority: *Lyle v. Barker*, 5 Binn. 457; *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Chesley v. St. Clair*, 1 N. J. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

A PLEDGEE HAS NO RIGHT TO SELL THE PROPERTY
PLEGDED TO SECURE A DEBT WITHOUT GIVING NOTICE
OF THE INTENDED SALE TO THE PLEDGOR

STEARNS V. MARSH

4 Denio N. Y. 227 (1847)

Assumpsit on a note, secured by ten cases of boots deposited with plaintiff. Verdict, under instructions from the court, for the balance due on the note.

By Court, JEWETT, J. The contract between these parties was strictly a pledge of the boots and shoes. At common law, a pledge is defined to be a bailment of personal property, as a security for some

debt or engagement; 2 Kent's Com. 577, 5th ed.; Story on Bail., sec. 286. The plaintiff's debt, thus secured, became payable on the eighth day of November, 1837. On the fifteenth of that month, the plaintiffs caused the pledge to be sold at a public sale by an auctioneer in Boston, pursuant to a public notice published in certain newspapers in that city from the second to the fifteenth of November inclusive; but no notice of sale, or to redeem, was at any time given to the defendants. The net proceeds of the sale was one hundred and sixty-six dollars and ninety-seven cents, which the plaintiffs applied on their debt without the assent of the defendants.

The first question made on the argument is, whether the sale thus made was authorized and bound the defendants. On the part of the plaintiffs it was insisted, that the pledge having been made as a security for their debt, which was payable at a future day, the plaintiffs had a right, after a default in payment, to sell the pledge, fairly in the usual course of business, without calling on the defendants to redeem, or giving them notice of the intended sale: and that such sale concluded the defendants. It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale, though in the former it is conceded that there must be such demand and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the pledgor. The old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale; or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale.

I find no authority countenancing the distinction contended for; but on the contrary, I understand the doctrine to be well settled, that whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated; *Cortelyou v. Lansing*, 2 Cai. Cas. 204; 2 Kent's Com., 5th ed., 581, 582; 4 Id. 138; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303; *Johnson v. Vernon*, 1 Bail. 527; *Perry v. Craig*, 3 Mo. 516; *Parker v. Brancker*, 22 Pick. 40; *De Lisle v. Priestman*, 1 Browne (Pa.), 176; *Story's Com. on Eq.*, sec. 1008; *Story on Bailm.*, sec. 309, 310, 346; *Hart v. Ten*

Eyck, 2 Johns. Ch. 100; Patchin v. Pierce, 12 Wend. 61; Garlick v. James, 12 Johns. 146 (7 Am. Dec. 294). Nor do I see any reason for such a distinction. In either case the right to redeem equally exists until a sale; the pledgor is equally interested, to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other: both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other; unless indeed the pledgor resorts to a court of equity to quicken a sale. Personal notice to the pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party. And if the pledgor can not be found and notice can not be given to him, judicial proceedings to authorize a sale must be resorted to: 2 Story's Com. on Eq., sec. 1008. Before giving such notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value of it from him, without tendering the debt; because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is to return the pledge, and it would therefore be nugatory to make the tender: Cortelyou v. Lansing, supra: Story on Bail. (2d. ed.) 349; McLean v. Walker, 10 Johns. 472.

The evidence in this case shows that the plaintiffs, in November, 1837, long prior to the commencement of this suit, tortiously sold the pledge, and thereby put it entirely beyond their power to return it, upon payment of the debt. Where a pledge is made by a debtor to his creditor to secure his debt, for a certain term, the law requires that the latter shall safely keep it without using it, so as to cause any detriment thereto; and if any detriment happens to it within the term appointed, it may be set off against the debt, according to the damages sustained. And if the pledge is made without mention of any particular term, the creditor may demand his debt at any time. When the debt is paid, the creditor is bound to restore the pledge in the condition he received it, or make satisfaction for it; if not, he is to lose his debt: 1 Reeve's Hist. Eng. L. 161, 162. If the pledgor, in consequence of any default of the pledgee, or of his conversion of the pledge, has by any action recovered the value of the pledge, the debt in that case remains, and is recoverable, unless in such prior action it has been deducted. By the common law the pledgee, in such an action brought for the tort, has a right to have the amount of his debt recouped in the damages: Bac. Abr., Bailment, B; Jarvis v. Rogers, 15 Mass. 389; Story on Bail. (2d ed.) secs. 315, 349.

The plaintiffs were wrong-doers in selling the pledge at the time they did, without notice to redeem or of the sale being given to the defendants; and it is shown that the value of the pledge at the time

equaled, if it did not exceed, the debt which it was made to secure. The counsel for the defendants, in effect, offered to recoup their damages arising from the plaintiffs' breach of the contract of pledge, but was not permitted to do so. It is urged by the plaintiff's counsel, that the defense was not admissible under the pleadings: but I am satisfied that it was unnecessary to plead specially, or to give notice of the matters relied on. The evidence establishes that the plaintiffs had no cause of action, and the defense is fairly covered by the plea of non assumpsit: *Batterman v. Pierce*, 3 Hill, 171; *Barber v. Rose*, 5 Id. 76; *Ives v. Van Epps*, 22 Wend. 155. The defendants clearly had an election of remedies against the plaintiffs for the conversion of the pledge. They could maintain trover or assumpsit, and in the latter action could recover the value under the common counts: *Hill v. Perrott*, 3 Taunt. 274; *Butts v. Collins*, 13 Wend, 139-154. If assumpsit was maintainable by them, they may, in an action by the plaintiffs, set off the value of the boots and shoes as for such property sold. There is no valid objection on the ground that the damages are unliquidated or uncertain. The case of *Butts v. Collins* is decisive on that point. There must be a new trial.

New trial granted.

WHERE RAILROAD STOCK IS DEPOSITED AS COLLATERAL SECURITY FOR THE PAYMENT OF A NOTE, IT CONSTITUTES A PLEDGE, AND CAN NOT BE SOLD WITHOUT NOTICE TO THE PLEDGOR.

WILSON V. LITTLE

2 N. Y. (2 Comstock) 443 (1849)

Trover for the conversion of railroad stock. Judgment for plaintiff.

By Court, RUGGLES, J. This was an action for wrongfully selling fifty shares of Erie railroad stock, which the defendants, Little & Co. had received in security for a loan of two thousand dollars made by them to Wilson, through the agency of R. L. Cutting, a broker. The contract in writing was in these words:

"\$2,000.

New York, December, 20, 1845.

"I promise to pay Jacob Little or order two thousand dollars, for value received, with interest at the rate of seven per cent. per annum, having deposited with them as collateral security, with authority to sell the same at the broker's board, or at public auction, or at private sale, at option, on the non-performance of this promise, without notice on fifty Erie.

"R. L. CUTTING."

The stock in fact belonged to the plaintiff Wilson, but stood in Cutting's name on the books of the New York & Erie Railroad Company. It was of that kind known as consolidated capital stock. Cutting negotiated the loan as the plaintiff's broker. On the same day Cutting made a transfer of the stock on the books of the company in the words following:

"N. Y. & Erie Co.

"For value received, I hereby transfer unto Jacob Little & Co. all my right, title, and interest in fifty shares of the consolidated capital stock of the New York & Erie Railroad Company.

"New York, Dec. 20, 1845.

R. L. CUTTING."

It is contended, on the part of the defendants, that the transaction was a mortgage, and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellants, and was only redeemable in equity. If this be true, the supreme court and the court for the correction of errors must have rendered their judgments in the case of *Allen v. Dykers*, 3 Hill (N. Y.), 593, and *Dykers v. Allen*, 7 Id. 498 (42 Am. Dec. 87), upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, two hundred and fifty shares of the stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive: See *Brown v. Bement*, 8 Johns. 98. If there had been good ground for saying, in *Allen v. Dykers*, that the stock was mortgaged and not pledged, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

The argument of the defendant in this case is founded on the

assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledgor; and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee can not otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which can not be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge: Story on Bail., secs. 290, 297. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws: 1 R. S. 600, sec. 1. It is so in the case of the New York & Erie Railroad Company: Laws of 1832, c. 224, sec. 18. The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed, it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. *Reeves v. Capper*, 5 Bing. N. C. 136, was a case in which the debtor "made over" to the creditor "as his property" a chronometer, until a debt of fifty pounds should be repaid. It was held to be a valid pledge.

In the present case the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be

construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of two thousand dollars, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper.

The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock.

In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee can not sell the pledge without a previous demand of payment, although the debt is technically due, immediately: *Story on Bail*, sec. 308; *Stearns v. Marsh*, 4 Denio, 227 (47 Am. Dec. 248).

Payment of the note in this case was not demanded until the third of January, 1846. Previous to that time, and about the twenty-fourth of December, 1845, the defendants had sold the whole or the greater part of the fifty shares of consolidated stock pledged to them by the plaintiff, and were therefore not in condition to fulfill the contract on their part by restoring the pledge. Nor were they able nor did they offer to restore the same kind of stock, or stock of the same value as that which had been pledged in behalf of the plaintiff. On the third of January, when the defendants offered to deliver the converted stock, which was of a different kind and value, the plaintiff's broker was willing to receive any stock of the same description offered by the defendants. There was at that time a material difference in the market price between the consolidated and the converted stock of the company, the former selling at eighty-five dollars, and the latter at fifty-five dollars, per share. The pledge restored or made good to the plaintiff

by assigning to him the same number of shares of converted stock. The defendants were bound to restore the identical stock pledged. The sale of it by the defendants before payment demanded was therefore wrongful, and the evidence sustains the third count in the plaintiff's declaration. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was therefore unnecessary: *Allen v. Dykers*, 3 Hill, (N. Y.), 596; *Dykers v. Allen*, 7 Id. 498 (42 Am. Dec. 87).

The remaining question is as to the rule of damages. The stock was disposed of by the defendants as early as the twenty-fourth of December, when its market price was about sixty-eight dollars the share. The defendant did not, however, distinctly inform the plaintiff then or afterwards that he had sold it, although he said he "had not got it," and gave that as a reason why he did not then transfer it, promising at the same time, that he would make the transfer as soon as the stock came in. The plaintiff, to accommodate the defendant, agreed to wait until the following day, when the transfer was not made, the defendant again promising to make it shortly. The plaintiff's broker reminded the defendant of the stock frequently, and on the thirtieth of December, formally notified him that he wanted to pay the loan and get back the stock, insisting that there should be no more delay, and that if it was not returned, he was directed by the party for whom he was acting to buy fifty shares at the board and charge it to the defendants. The defendant then said the stock should be returned the next day, but failed to return it; and it was not until the second of January that the defendant ceased to hold out the expectation of restoring the stock, or stock of the same kind and of equivalent value. On that day and on the third of January, the consolidated stock sold at eighty-five dollars the share.

The defendants insist that they are chargeable only with the value of the pledge at the time it was wrongfully converted by them to their own use on or before the twenty-fourth of December, and not with its increased value at any subsequent period. The court below, in making up the verdict, estimated the stock at eighty-four dollars the share. In actions for the wrongful conversion of personal property, it has in some cases been held that the value of the property is to be estimated according to its price at the time of the conversion, and in others that the plaintiff is entitled to damages according to its value at any time between the time of the conversion and the day of the trial: *Bank of Buffalo v. Kortright*, 22 Wend. 348, 366. It is unnecessary in this case to settle the general rule. The ground on which the defendants insist that the damages must be estimated according to the price of the

stock on the twenty-fourth of December, is that the plaintiff, on learning that the defendants had sold it, might then have gone into the market and purchased it at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendants to restore the stock. Although the plaintiff was strictly entitled to a retransfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendants at their request for the fulfillment of their obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendants, and having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged when the defendant finally failed in his promises to restore it.

Judgment affirmed.

WHERE A SLAVE IS PLEDGED TO SECURE A LOAN, ON PAYMENT OF THE LOAN AND INTEREST, THE PLEDGOR IS ENTITLED TO COMPENSATION FOR THE SERVICES OF THE SLAVE, WHILE IN THE POSSESSION OF THE PLEDGEE

HOUTON V. HOLLIDAY

2 *Murphy N. C. 111*, (1812)

Quantum meruit for money had and received. Henry Taylor borrowed of Holliday \$200.00 and pledged as security his negro slave, whose services were worth \$60.00 a year. Taylor died, leaving the slave to his daughter Lucy, who a year later married Houton. The latter paid the loan, received back the slave and demanded of Holliday pay for the services of the slave from Taylor's death until payment of the loan. Verdict for plaintiff for excess of the services over interest on the loan.

By Court, TAYLOR, C. J. It has been the uniform practice of the courts of equity of this state, to make a mortgagee in possession to account for the rents and profits upon a bill filed for redemption. This is a necessary consequence of the principles which prevail in those courts relative to a mortgage, which is considered only as a security for money lent, and the mortgagee a trustee for the mortgagor. To sanction an opposite doctrine, even in the case of pledges where the profits exceed the interest of the money lent, would be to furnish facili-

ties for the evasion of the statute against usury, almost amounting to a repeal of that salutary law. Nothing can come more completely within the legal notion of a pledge, than the slave held by Holliday in the present case, for by the very terms of the contract, it was so to continue until the money should be paid; no legal property vesting in Holliday, who had only a lien upon it to secure his debt. All the profits therefore, exceeding the interest of his debt, he received to the plaintiff's use, and can not conscientiously withhold. Wherever a man receives money belonging to another, without any valuable consideration given, the law implies that the person receiving, promised to account for it to the true owner; and the breach of such implied undertaking is to be compensated for in the present form of action, which is according to Mr. Justice Blackstone, "a very extensive and beneficial remedy, applicable to almost every case where a person has received money, which *ex aequo et bono*, he ought to refund." Nor is its application to cases like the present, without authority from direct adjudication; the case of *Astley v. Reynolds*, Strange, 915, furnishes an instance of a man being allowed to receive the surplus which he had paid beyond legal interest, in order to get possession of goods which he had pledged. In principle, the cases are the same; the only thing in which they differ is, that in the case before us, the money was received by the defendant from the labor of the pledge; in the other, it was paid by the sheriff.

Let judgment be entered for the plaintiff.

WHERE GOLD WAS PLACED IN THE VAULT OF A BANK
FOR SAFE-KEEPING AND WAS STOLEN BY THE CASHIER
AND CHIEF CLERK, THE BANK IS NOT LIABLE

FOSTER V. ESSEX BANK

17 Mass. 479 (1821)

Assumpsit by executors of Israel Foster to recover \$50,000 deposited by Foster with the bank for safe keeping, and stolen by their cashier and chief clerk. The cask containing the gold was weighed in the presence of the president and cashier, but the directors had no knowledge of this deposit, though it had been the custom of the bank to receive special deposits. No special account was kept by the bank of such deposits. With this gold was stolen most of the capital of the bank, and it appeared the books had been falsified for more than two years, during which they had not been regularly posted.

By Court, PARKER, C. J. This is assumpsit to recover of the de-

defendants the value of certain gold deposited by the plaintiffs' testator in the bank, of which the defendants are the proprietors; and the facts upon which the action is founded, are established by a special verdict found by the jury who tried the issue. Those facts are multifarious, and present several very important questions of law, which have been investigated by the counsel with all the research and ability which novelty, in their application to a subject of so general concern as banks seemed to demand. No case has, however, been produced on either side so opposite as to relieve the court from an inquiry into the general principles on which the action is founded; and after all the pains which other public engagements have allowed us to bestow on this particular case, no authorities have been discovered, having an essential bearing upon it, which had escaped the diligence of the counsel employed in the argument.

The public importance of the questions had induced us to delay forming a conclusive opinion, while there was any room to suppose we might be mistaken; and doubts, which have until a late period prevailed with one or other of us, owing to a want of time for examination, rather than to any intrinsic difficulty in the case, have occasioned repeated revisions of the arguments of counsel, and frequent recurrence to the authorities cited. Our minds are now definitely settled; and we hope to be able to show that the result we have come to is supported by the best-approved principles of the common law, and conformable to decisions, ancient and modern, in analogous cases. In attempting to do this, we shall consider: 1. Whether the bank made any contract with the plaintiffs' testator; 2. What is the nature of that contract; 3. Whether it has been violated.

1. On the first point we have had little difficulty; for, notwithstanding the act of incorporation gives no particular authority or power to receive special deposits, and although the verdict finds that there was no regulation or by-law relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way, and as the practice was known to the directors, and, we think, must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered the depository, and not the cashier or other officer through whose particular agency commodities may have been received into the bank.

No authorities are necessary to support this position. It rests upon common and familiar principles. The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so if the servant, secretly and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties. And this brings us to the consideration of the second point, viz.:

2. The nature and legal qualities of this contract. It will not be disputed that if it amounts only to a naked bailment, without reward and without any special undertaking, which in the civil and common law is called depositum, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of it. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind. For, although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns.

This principle, although denied by Lord Coke, as in 1 Inst. 89, b, has been received as the law regulating gratuitous bailments, as it is sometimes called, or mere deposit, where there is no advantage but to the depositor, from the luminous opinion of Lord Holt in the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, down to the profound and brilliant treatise of Sir William Jones, in which, with a wonderful mixture of learned research and classical illustration, he has analyzed the complicated contract of bailment, and applied the principles of moral philosophy, the doctrines of the civil law, and the usages of all nations, ancient and modern, to the different branches of this diversified subject, so as to leave little room for speculation, except as to the application of his rules to particular cases as they arise.

The dictum of Lord Coke that the bare acceptance of goods to keep

implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and Sir W. Jones insists that such a harsh principle cannot be inferred from Southcote's case, 4 Co. 83, on which Lord Coke relied; the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings, from which it might be inferred either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges Gawdy and Clench, who alone decided that cause, said that the plaintiff ought to recover, because it was not a special bailment, by which the defendant accepted to keep them as his own proper goods, and not otherwise; S. C., Cro. Eliz. 815; the inference which Lord Coke drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the dictum of Lord Coke in his Commentary, were fully and explicitly overruled by all the judges in the case of *Coggs v. Bernard*, and upon the most sound principles. It is so considered in Hargrave and Butler's note to Co. Lit. n. 78, and all the cases since have adopted the principle, that a mere depositary, without any special undertaking and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is everywhere observed, bears so near a resemblance to fraud as to be equivalent to it in its effect upon contracts.

Indeed, the old doctrine, as stated in Southcote's case, and by Lord Coke, has been so entirely reversed by the more modern decisions that instead of a presumption arising from a mere bailment that the party undertook to keep safely, and was therefore chargeable unless he proved a special agreement to keep only as he would his own, the bailor, if he would recover, must in addition to the mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to Sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretions; so that if goods deposited with one who engaged to keep them safely were stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee.

And Sir William Blackstone, in his commentary, recognizes the same principle; for he says, "If a friend delivers anything to his friend to be kept for him, the receiver is bound to restore it on demand; and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise, unless he expressly undertook to keep them only with the same care as his own goods; and then he should not be answerable for theft or

other accidents. But now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertake specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own": 2 Bl. Com. 453. And this certainly is the more reasonable doctrine; for the common understanding of a promise to keep safely would be, that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement, and an adequate consideration therefor.

The doctrine, as thus settled by reason and authority, is applicable to the case of a simple deposit, in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable. If we proceed one step further in the gradation of liabilities, we shall discover every legal principle which can by possibility affect this cause, considered as founded on a contract of bailment. It was urged by the plaintiffs' counsel that this is not a naked bailment, but is accompanied with an advantage from the use of the property, or the credit derived from the custody of it; and that this ought to be viewed in the light of a reward, so that the case will be brought within the principle of bailment for hire or reward. If it be so, the principle applicable to this species of bailment goes no further than to make the bailee liable in case of ordinary neglect; so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused. This is the doctrine of Sir William Jones, and was the opinion of Lord Kenyon in the case of *Finnucane v. Small*, 1 Esp. 315, cited in the argument, which, though a *nisi prius* decision, is satisfactory evidence of the law, as two very eminent sergeants acquiesced in his opinion. And this is also reasonable, for one who takes goods into his warehouse to keep for a stipulated price, does not intend to insure them against fire and thieves. His compensation is only in the nature of rent; or if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse as other prudent people do, and thieves break through and steal, he ought not to be accountable; if he leave the door or windows open, he ought to be. The common sense of man-

kind must acquiesce in these reasonable provisions of law: and without doubt the common dealings of men are governed by them as principles of natural justice, without a knowledge of the positive law.

Having thus settled, satisfactorily to ourselves, the principles by which our judgment in this action is to be guided, we proceed to a consideration of the facts, in order to ascertain under what species of bailment the plaintiffs' property was committed to the keeping of the defendants. It has been before observed that as it was received into their building and placed in their vaults by their servants, according to a practice allowed of by them, they must be responsible in some degree, and are bound to restore it, or the value, unless it has been lost by some accident for which they are not liable by the nature of their contract. We think there is no doubt that on such a deposit an action of trover would lie against the corporation, if they should refuse to deliver the property on demand, and assumpsit might also be maintained, it being settled by the later authorities that either action may be maintained against an incorporated company, as well as against a natural person, although the doings on which the action is founded are not verified by the seal of the corporation. Vide the opinion of Mr. Justice Story in the case of the Bank of Columbia v. Patterson, 7 Cranch, 299, in which all the learning upon the subject of corporate liabilities is exhausted.

Looking into the special verdict, we find the money of the plaintiffs' testator contained in a chest which was locked, and the key kept by his agent, was received into the bank by W. S. Gray, the cashier, in the presence of W. Orne, who was president of the bank at the time. The money, being gold, was weighed in the presence of the president and cashier, and a memorandum of the different pieces in separate bags taken by the cashier and given to Mr. Bond, the testator's agent, with the writing signed by Mr. Gray as cashier, viz., "Left at Essex Bank for safe-keeping." The verdict finds that the chest containing the gold was left at the bank as a special deposit: that the bank was not authorized to use the money, or treat it otherwise than as a special deposit; that it was kept in the vault of the bank until it was removed to Haverhill for better security in time of war, with the consent and at the expense of the owner; that after the danger was over it was brought back and replaced in the vaults of the bank, with the specie belonging to the bank, and there remained until it was pilfered as afterwards stated in the verdict. Mr. Bond, the agent of the owner, was in the practice of coming to the bank to look into the vault to see that the money was safe, but it did not appear that he opened the cask or counted the money. Some of the doubloons were delivered to the

agent, on the order of the testator, by the cashier in August, 1917: and at other times other doubloons were delivered in the same manner on similar orders. At each of these times the cask was opened by the cashier or chief clerk to deliver the doubloons pursuant to orders. This was done without the knowledge of any of the directors. They knew nothing of the delivery of the doubloons, nor was any account taken of them in the books of the bank. It is found that no return or statement of special deposits was ever made to the directors by the cashier; and that such deposits are made and taken away without the particular knowledge of the directors, although they know it is the practice so to receive and take them. The directors knew nothing of the nature or amount of this or any other special deposit, unless such knowledge may be presumed from the agency of the president and cashier in receiving this deposit, or of the cashier when he delivered the doubloons pursuant to orders. And it is found not to be the practice of this or any other bank, for the directors to inspect or examine special deposits, and it is considered improper for any officer to do so without the consent of the depositor.

Upon this state of facts, we think it must be manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest, of or the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for any price of its custody, and it was not thought that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or a simple deposit, this was one, unless the memorandum given by the cashier altered its character, or unless the nature of such a deposit is such as to have given the bank a right to derive profit from it; both of which points have been contended for by the counsel for the plaintiffs.

As to the first of these points supposing the bank to be answerable for any special undertaking of the cashier, we perceive no evidence of such an undertaking in this case. The writing signed by the cashier is merely a memorandum, signifying that the chest and its contents were left in the bank for safe-keeping. It contains no promise, and assumes no risk other than would be derived from the mere delivery without any writing. Nor does it receive any additional force from the presence of Mr. Orne, and his certificate of the gold having been weighed in his presence. For in this he did not act or sign officially: and if he had

assumed to do so, it not being within the scope of his authority, as president, to charge the bank with any special liability, his act could not have bound the corporation, who, according to the practice as found by the jury, take no notice of special deposits. And the same may be said of the memorandum signed by the cashier. For if he had undertaken to make the bank specially answerable for a deposit, contrary to its usage, and to the nature of the contract implied by accepting such a deposit, such an undertaking, without previous authority or subsequent assent, would have failed to implicate the bank.

We think, also, that there is nothing in the nature of such a deposit, or in the usages of banks or in the act incorporating the bank, from which any qualities can be attached to this bailment, which do not belong to that class of contracts generally, where the advantage is wholly on the side of the depositor. It was contended that the bank might discount on this property. But if the true nature of a special deposit is understood by us, and we think its character is properly described in the special verdict, we are of opinion this could not be done. For although the bank, by implication, are allowed in the act of incorporation to have credit upon the simple amount of all the moneys deposited for safe-keeping, we are satisfied that the legislature had reference to general deposits only in this provision. It does not appear that this or any other bank ever issued notes upon the credit or special deposits; indeed they could not, as the amount of such deposits, or the value of them, is generally wholly unknown to the directors and the company. The eighth section of the incorporating act, we think, clearly shows that the deposits referred to in the third section are general deposits. For in the eighth section an annual account of the moneys deposited is required to be made to the governor and council, in order that it may be ascertained whether there has been an excessive issue of notes. Now, of special deposits, no such account can be rendered, because none is kept; and we have never heard that any bank has been complained of, as violating its charter, for not rendering an account of such deposits.

We see, then, no profit to the bank arising from special deposits unless it be, as was suggested, that they acquire an increased credit with the community on their account. But any credit founded upon such deposits would be fallacious, since they cannot be meddled with by any officer of the bank, although authorized by a vote of the corporation, without a breach of trust, which would subject them to an action. As to the idea suggested, that the business of the bank may be facilitated and increased by the accommodation given to special depositors, the advantage, if any, is too minute and remote to affect their liability. Such deposits are, indeed, simply gratuitous on the part of the bank,

and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-houses or stores: and this is rendered more probable from the well-known fact, that not only money or bullion, but documents, obligations, certificates of public stocks, wills and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe keeping. This is wholly different from the deposits contemplated in the act on which notes may be issued, for they enter into the capital stock, become the property of the bank, as much as their other moneys, and the bank become the debtors to the depositors for the amount.

3. The contract in the present case being then only a general bailment, the third question to be discussed is, whether the contract has been executed by the bank, I use the word bank for the corporation, consisting of the president, directors and company, for the sake of brevity.

The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable in case of loss for gross negligence only, or fraud, which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred from anything found by the verdict; for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. The want of books, showing the number and amount of deposits is not a culpable negligence; for the acceptance of the deposit being voluntary, the bank was not obliged to incur any labor or expense in this respect; and, besides, the agent of the depositor required nothing but a memorandum from the cashier; and this was more than he could have insisted on as a right. As to the supposed neglect and carelessness of the directors, in not inspecting the cashier's accounts more strictly, so as to have detected his fraudulent management of the books to cover his speculation; this concerned the property of the company, not that of special depositors; and the reputation of the cashier, and general confidence in him, found by the verdict, is a sufficient answer to any charge of negligence in his original appointment or continuance in office.

We have thus prepared the way for the discussion of the great question in the case, and we believe, the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence; and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud.

Fraud on property deposited, committed by the depositary, or his servants acting under his authority, express or implied, relative to the subject-matter of the fraud, is equivalent to gross negligence, and renders the depositary liable. No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect.

The point, then, is narrowed to this consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers; and here it being thought there was some discrepancy in the authorities, we have felt ourselves obliged to examine minutely all which have been cited, and all others having a bearing on the question.

It was contended, by one of the counsel for the plaintiffs, as a proposition universally true, that the principal is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of Lord Kenyon, in the case of *Doe v. Martin*, and also by Lord Ellenborough, in 1 Campb. 127. And yet, it must strike the mind of every man of sense, that this universal proposition will admit of, and indeed, upon principles of common justice, actually requires, considerable qualifications. - No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty toward me, that I shall be civilly answerable for such fraud. If I send him to market, and he steps into a shop and steals, or, upon false pretenses, cheats the shopkeeper of his goods, I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire; and yet the proposition, as stated, will embrace a case of this kind. The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master; and this was the state of things in both the cases which are cited to support the proposition, and they go upon the principle of an implied authority to do the act.

The rule of law is correctly laid down by Sir William Blackstone, 1 Bl. Com. 429; viz., "that the master is answerable for the act of his servant, if done by his command, either expressly given or implied." And in another place, "If a servant by his negligence does any damage to a stranger, the master shall answer for his neglect, but the damage must be done while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehavior." *Id.* 431. The same rule will apply more strongly to frauds practiced by the servant. Christian, in a note to this passage, approves this doctrine, and illustrates it with some observations of his own.

The supreme court of the United States recognize the same doctrine

in the case of *The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat. 326, in which it is said that the liability of the principal depends upon the facts: 1. That the act was done in the exercise; and 2. Within the limits of the powers delegated. Any act, they say, within the scope of the power or confidence reposed in the agent, such as money credited in the books of the teller of a bank, or proved to have been deposited with him, although he omits to credit it. And in the case of *Ellis v. Turner*, 8 T. R. 533, Lord Kenyon says: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them, as if he being master of the defendants' vessel, were to commit an assault upon a third person in the course of his voyage." And upon the same principle it has been holden that if a servant willfully drive his master's carriage against the carriage of another, the master is not liable for the damages: 1 East, 106. And the reason is the same; for in such case there is no authority from the master, express or implied; the servant in that act not being in the employment of his master. In the case here referred to, the master was not in the carriage at the time; the law would have been the same if he had been present, and had endeavored to prevent the act; the presence of the master being only presumptive evidence of authority.

I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong either fraudulently or feloniously towards another, the master is not more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule founded on public policy.

We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask, or open it, and so could not lawfully communicate any authority; and that they did not, in fact, give any, is found by the verdict. Nor did they in any manner assent to, or have any knowledge of it. There are no circumstances, then, from which such authority can be implied. The chest or cask when once placed in the vault was to remain there until taken away by the owner, or ordered away by the bank; either party having a right to discontinue the bailment. It was never opened but by order of the owner until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents,

or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over, that this, together with other property there, should be secure from theft. He cannot, therefore, be considered, in any view, as acting within the scope of his employment when he committed the villainy, and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank.

If it be asked for what acts then of a cashier or clerk the bank would be answerable, I should answer, for any which pertain to their official duty, for correct entries in their books, and for a proper account of general deposits, so that, if by any mistake or by fraud in these particulars any person be injured, he would have a remedy. If they should rob the vaults of the property of the bank, the company would necessarily lose; and if the bank have become debtors to those who have deposited otherwise than specially, their debts will not be diminished by the fraud; so that in this form they are answerable to depositors, and for the correct conduct of all their servants, in their proper sphere of duty, they are answerable. They may also be answerable for notices to indorsers upon bills and notes left with them for collection, if there should be a failure by neglect of any of their servants, because they have undertaken to give the proper notices. But even in that case it may admit of a question whether they would be liable any further than attorneys who undertake the collection of debts, would be. But they are not answerable for special deposits stolen by one of their officers any more than if stolen by a stranger, or any more than the owner of a warehouse would be who permitted his friend to deposit a bale of goods there for safe keeping, and the goods should be stolen by one of his clerks or servants.

The undertaking of banking corporations, with respect to their officer is that they shall be skillful and faithful in their employments: they do not warrant their general honesty and uprightness. And it is the same with individuals. If a friend commit to my care valuable property to keep for him, and it be stolen by my servants, I shall not be answerable for the loss, as was stated by Lord Kenyon in the case of *Finnucane v. Small*. This case, before referred to for another purpose, deserved special notice upon this point; for if it be law, it goes the whole length of the case before us, and even beyond it; for the bailee there received a reward for his custody of the goods which were stolen. The plaintiff was an officer in the army, and being about to leave London, sent his trunk to the defendant's house for safe custody, and was to pay one shilling a week for house-room. When he returned he received the trunk,

but the contents had been stolen. Lord Kenyon held the defendant not liable, it appearing that he had taken as much care of the trunk as he had of his own goods; and that if the goods were stolen by the defendant's servants, as was stated to have been the fact by the plaintiff's counsel, it would make no difference. His lordship no doubt considered the hire agreed to be paid as mere compensation for house-room, not as a reward for diligence and care, and therefore did not require of the defendant more care than he used about his own goods, considering it as a simple deposit only. Whether he was right or not in this, there is no doubt of the correctness of his opinion with respect to the agency of the servants in the theft; for they were not in the course of their duty when pilfering the trunk of its contents. Garrow and Shepherd, eminent sergeants, and since judges, acquiesced in the opinion.

The case is in all respects like the one before us, except that the goods were to be kept for hire: and the difference is altogether in favor of the defendants in the present case. In answer to this, it was observed by the counsel for the plaintiffs that the cashier of the bank was trusted, and therefore, the doctrine of Lord Kenyon did not apply. But if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having anything to do with the chest or cask but to give it a place in the vault, and to lock it up when the hours of business were over; and so the cashier must be considered like the servant in the case cited.

Some stress was laid in the argument upon the security taken by the bank of the cashier for the faithful discharge of his duty. But we think it obvious that nothing was contemplated in the security but the official neglect of the cashier. The act of incorporation authorizes the bank to require bonds, in a sum not less than ten thousand dollars; and a bond was taken for that sum only. Now, considering this as one of the oldest banking companies in one of the most wealthy towns in the commonwealth, without doubt special deposits of a vast amount were from time to time received into the bank for safe-keeping, and a bond for ten thousand dollars could never have been taken to indemnify against a possible loss of these.

Upon a view, therefore, of all the points in the case, and after a careful attention to the arguments and authorities, we are satisfied that upon the special verdict, judgment must be entered for the defendants.

Costs for the defendants.

**RISK OF LOSS WHERE SELLER THOUGH DELIVERING
POSSESSION RETAINS TITLE FOR PURPOSE
OF SECURITY**

BURLEY V. TUFTS

66 Miss. 48

Tufts sold Burley a soda water fountain on installments, title to remain in Tufts until the last installment was paid. Before the last installment became due, the soda water fountain was destroyed by fire without the fault of either party. Burley claimed that he was not liable to Tufts for the last installment because Tufts still held the legal title, and therefore the risk of loss from fire was on him. Burley had complete control and use of the property from the time of its purchase until it burned.

COOPER, J. delivered the opinion of the Court: "Burley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property had been destroyed while in his custody and before the time of payment of the note last due on payment of which only his right to the legal title to the property would have accrued, does not relieve him of payment of the price agreed on. The transaction was something more than an executory conditional sale. The seller had done all he was to do except receive the purchase price; the purchaser had received all he was to receive on consideration of his promise to pay. The inquiry is not whether if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made, his promise is absolute or conditional. The contract made was a lawful one, and as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from his obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it can not do.

Singer Sewing Machine Co. v. Cole, 4 Lea 439.

Keitt v. Counts, 15 S. C. 493.

Judgment affirmed.

THE GENERAL ASSEMBLY OF THE STATE OF ILLINOIS HAS
THE RIGHT TO FIX BY LAW THE MAXIMUM CHARGES
FOR STORING GRAIN IN WAREHOUSES

MUNN V. ILLINOIS

94 U. S. 113 (1876)

Action against Munn and Scott, owners of a grain elevator in Chicago, for failing to take out a license under a statute passed by the legislature in pursuance and under authority of an article of the constitution of Illinois, and for charging for storage more than the rates fixed by such statute. The defendants were found guilty and fined \$100, and this was affirmed by the Supreme Court of Illinois. Munn & Scott sued out writs of error to this court.

Mr. Chief Justice Waite delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sec. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states;"

2. To that part of sec. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and

3. To that part of amendment 14 which ordains that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the Amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislature of the states.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. Rutland & B. R. R. Co.*, 27 Vt. 143, 62 Am. D. 625; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the

powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sec. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to

be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says:

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housillage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation

and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Allnutt v. Inglis*, 12 East. 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation was paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537):

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539):

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from *De Portibus Maris* already quoted), which included the good sense as well as the law of the subject."

And in the same case *Le Blanc*, J., said (p. 541):

"Then admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if

so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge:

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in *Magna Charta*; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulations of mills, ferries, bridges, turnpike roads and other kindred subjects." *Mobile v. Yuille*, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of

common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:

"And whereas divers wagoners and other carriers, by combination among themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, sec. 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sail through the St. Lawrence directly to Europe The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by team, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense

structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carriers; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way to "four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should

not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contract, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

Judgment affirmed.

THE TERMS "INN" AND "GUEST" DEFINED

FAY V. PACIFIC IMPROVEMENT CO.

93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943 (1892)

Action against an innkeeper for damages to jewelry by fire.

The Court. Upon further consideration of this cause, after hearing in Bank, we are satisfied with the conclusion reached in Department, and with the opinion there rendered, and for the reasons stated in said opinion the judgment and order appealed from are affirmed.

The following is the opinion of Department Two, above referred to, rendered on the 23rd of June, 1891:—

DE HAVEN, J. The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property needed for her personal use, consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor.

The court below found that the Hotel Del Monte was, at the date named, a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings, and also that the burning of the hotel was an irresistible superhuman cause, for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—a hotel. In *Wintermute v. Clark*, 5 Sand. 247, an inn is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in *Pinkerton v. Woodward*, 33 Cal. 596; 91 Am. Dec. 657. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in *Schouler on Bailments*: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." *Schouler on Bailments*, 253.

We think that the evidence in this case is full and complete to the

point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper: *Krohn v. Sweeny*, 2 Daly, 200. Nor was the force of this evidence in any wise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it.

"Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn, the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainments:" *Schouler on Bailments*, 249.

2. The evidence shows that the plaintiff was a guest and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board is not sufficient of itself to show that she was not received as a guest: *Pinkerton v. Woodward*, 33 Cal. 597; 91 Am. Dec. 657; *Hancock v. Rand*, 94 N. Y. 1; 46 Am. Rep. 112; *Jalie v. Cardinal*, 35 Wis. 118; *Hall v. Pike*, 100 Mass. 495; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417.

The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest: *Hall v. Pike*, 100 Mass. 495. Not

only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the East. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn."

In this case, the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown, further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts the defendant is liable: *Hulett v. Swift*, 33 N. Y. 571; 88 Am. Dec. 405. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ: 1 Am. & Eng. Ency. of Law. 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency: *Miller v. Steam Nav. Co.*, 10 N. Y. 431, Chicago, etc., *R. R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rec. 613.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper, in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession.

"The guest may retain personal custody of his goods within the inn,—as of his trunk and its contents, his wearing apparel, and other

articles in his room, and any jewelry or valuables carried or worn around his person,—without discharging the innkeeper from responsibility;" *Jalie v. Cardinal*, 35 Wis. 126.

We have examined the other points made by appellant, but do not think they call for special discussion.

The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability in this respect is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.

AN INNKEEPER IS AN INSURER OF THE GOODS OF HIS GUESTS

SIBLEY *v.* ALDRICH

33 N. H. 553 (1856)

Case, for injury to a horse left by plaintiff's servant in the stable of defendants' inn. It appeared that the horse was kicked by the horse of another traveler, and his leg broken, but defendant offered evidence, which was excluded, that there was no negligence on the part of himself or his servants. Verdict for plaintiff, by consent, judgment to be rendered thereon or verdict set aside as court should see fit.

By Court, PERLEY, C. J. The defendant offered to prove that the damage to the plaintiff's horse was not caused by any actual negligence of himself or his servants. He did not offer to prove that it happened through the negligence or default of the plaintiff, direct or implied; nor by irresistible force, inevitable accident, or by the act of God or the public enemy. The question would seem to be whether as a general rule, and in all cases, an innkeeper can discharge himself from liability for the loss of his guest's goods by showing that it did not happen by the actual neglect or default of himself or his servants.

On this point the authorities are not unanimous. Story, in his work on Bailments, sec. 482, says: "By the common law, as laid down in *Calve's Case* (8 Co. 32), an innkeeper is not chargeable unless there is some default in him or in his servants, in the well and safe-keeping and custody of his guest's goods and chattels within his common inn but he is bound to keep them safe, without any stealing or purloining"—quoting thus far the language of the report in *Calve's Case*, *supra* and then he

adds: "This doctrine is, however, to be taken with the qualification that the loss will be deemed *prima facie* evidence of negligence." And in section 472, he says that this doctrine should be received with some hesitation, in view of the case of *Richmond v. Smith*, 8 Barn. & Cress. 9, where a different view of the law seems to have been entertained. Story's authority on a question of this nature is undoubtedly of great weight; but it is to be observed that he states his opinion with some hesitation, and he does not appear to have reached a conclusion in this instance, after his usual extensive and careful examination of the authorities.

In *Dawson v. Channey*, 5 Ad. & El. N. S., 165, it was held that when goods have been deposited in a public inn, and there lost or injured, the presumption is that the loss or damage was caused by the negligence of the innkeeper or his servants; but that this presumption may be rebutted, and if the jury find in favor of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty. Lord Denamm cited Story as authority for this rule. The circumstances of *Dawson v. Channey*, *supra*, were much like those of the present case. The plaintiff gave his horse in charge to the defendant's hostler, who placed him in a stable with another horse, that kicked him and caused the injury complained of. *Metcalf v. Hess*, 14 Ill. 128, is to the same point, that an innkeeper may discharge himself by showing that the loss happened without any default on his part. The foregoing authorities go to sustain the position of the defendant.

In *Merritt v. Claghorn*, 23 Vt. 177, the court held that an action can not be maintained against an innkeeper to recover for property lost by fire, which was occasioned by inevitable casualty, or superior force, and without any negligence on the part of the innkeeper or his servants. The last case is put on peculiar grounds, and can not be regarded as an authority for the general position that an innkeeper may discharge himself by showing that the loss did not happen by his default. The fire took in another building and spread to the inn.

So in *Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. D. 416, it was held that an innkeeper is *prima facie* liable, but not for a loss by external force or robbery, or if the loss occur by the neglect of the guest or his servants, or his companions: *Forward v. Pittard*, 1 T. R. 27, 31.

On the other hand, there are numerous authorities, direct and strong, to the point that the innkeeper can not discharge himself by showing that loss did not happen by his default, but that he must go further, and show that it was caused by the default, direct or implied, of the owner.

Thus Chancellor Kent, 2 Com. 574, says: "An innkeeper, like a common carrier, is an insurer of the goods of his guest, and can only

limit his liability by express agreement or notice. Rigorous as this law may seem, and hard as it may actually be in some instances it is, as Sir William Jones observes, founded on the principles of public utility to which all private considerations ought to yield." Metcalf, in his note to *Bedle v. Morris*, Yelv. 162, places the liability of an innkeeper and common carrier on the same footing, and so does the civil law: Domat, B. 1, T. U., sec 2, a, 1. *Burgess v. Clements*, 4 Mau. & Sel. 306, was much considered. The point there decided was, that an innkeeper is not answerable for the goods of his guest which are lost through the negligence of the guest out of a private room in the inn chosen by the guest for the purpose of exhibiting the goods for sale, the use of which room was granted by the innkeeper, who, at the same time, told the guest that there was a key, and that he might lock the door, which he neglected to do. In commenting on *Calve's Case*, 8 Co. 32, and the language of the old writ, Lord Ellenborough is reported to have said: "There can be no doubt, also, that there may be circumstances as if the guest by his own neglect induces the loss, or himself introduces the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall not complain of the loss." And *Le Blanc, J.* in the same case, says: "We must take the facts from the report, and also that the judge stated to the jury that the innkeeper was responsible to his guest for the safe custody of his goods, but that the guest might by his own misconduct discharge the innkeeper from the responsibility." Here the general responsibility of the innkeeper for the safety of his guest's goods is clearly conceded. The decision is put on the ground of misconduct in the guest, which caused the loss, without any intimation that mere want of negligence in the innkeeper would discharge him. *Farnworth v. Packwood*, 1 Stark, 249, is to the same point with *Burgess v. Kent*, 4 Mau. & Sel. 306.

In *Richmond v. Smith*, 8 Barn. & Cress. 9, Lord Tenterden says: "It is clear that at common law, when a traveler brings goods to an inn the landlord is responsible for them. In this respect I think the situation of the landlord was precisely analogous to that of the common carrier;" and *Bailey, J.*, in the same case, says, "It appears to me that an innkeeper's liability very closely resembles that of a common carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated when the guest chooses to have the goods under his own care."

In *Kent v. Shuckard*, 2 Barn. & Ad. 803, Lord Tenterden is reported to have used the following language: "Innkeepers, like common carriers, are liable by the custom of the realm. The principle on which the lia-

bility of an innkeeper for the loss of the goods of his guest is founded is both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and other persons."

Armistead v. White, 6 Eng. L. & Eq. 349, was an action against an innkeeper, and the judge charged the jury that if the owner of the goods was guilty of gross negligence, the innkeeper was discharged. The court held the instructions were sufficiently favorable to the plaintiff, and queried whether it was necessary that the negligence of the plaintiff should be gross, to discharge the defendant. It is not easy to understand why the cause should have been left to the jury in this way, if the doctrine of the prior case of *Dawson v. Channey*, 5 Ad. & El., N. S., 165, had been recognized for law, and it is worthy of remark that no allusion is made to *Dawson v. Chamney*, *supra*, in the report of *Armistead v. White*, *supra*.

In *Mason v. Thompson*, 9 Pick. 280, 20 Am. D. 471, it was decided that an innkeeper is liable for the loss of his guest's goods committed to his care, unless the loss is caused by the act of God or the common enemy, or by the fault of the guest. And *Wilde, J.*, delivering the opinion of the court, says that this rule may undoubtedly in some cases subject the innkeeper to loss without any negligence or default on his part; that innkeepers as well as common carriers are regarded as insurers of property committed to their care, and are bound to make restitution for any loss or injury not caused by the act of God or the common enemy, or the neglect or fault of the owner. And it was decided in *Washburn v. Jones*, 14 Barb. 193, that an innkeeper is liable for all losses and damages happening, even without his default, excepting such as are caused by inevitable accident or the public enemy.

The question was very fully and ably discussed in the recent case of *Shaw v. Berry*, 31 Me. 478 (52 Am. Dec. 628), and the court there came to the conclusion that to discharge an innkeeper from liability for the loss of goods in his charge it is not sufficient for him to show that the loss did not happen by his neglect or default, but that he must go further and show that it happened by the fault, direct or indirect, of the owner.

The leading case on this subject is *Calye's Case*, 8 Co. 32, a, in which the point resolved was, that if a horse is put out to pasture at the request of the owner by an innkeeper, and is stolen, the innkeeper is not liable, because the horse, not being *infra hospitium*, is not in the charge and custody of the innkeeper as such, and his liability as an innkeeper does not attach. The report cites the words of the old writ, and states that by it all the cases concerning hostlers may be decided. The part of the writ

which bore on the point resolved was that which limits the liability of the innkeeper, by the custom of the realm, to goods of the guest *infra hospitium*; and in commenting on the language of the writ, the reporter says that "the innkeeper shall not be charged unless there be a default in him or his servants in the well and safe-keeping and custody of the guest's goods within his common inn; for the innkeeper is bound in law to keep them safe there, without any stealing or purloining, but ought to keep his goods and chattels there in safety." Considering the connection of these remarks with the point resolved in the case, we think they could not have been intended to lay down any rule defining the extent of the innkeeper's liability for goods in his custody as such, but merely to state that his liability was confined to goods deposited in the inn.

The case then proceeds to state an exception to the rule that the goods within the common inn the innkeeper ought to keep in safety, to wit, that if the goods are stolen by one whom the guest brings with him, the innkeeper is not liable, for then the fault is the guest's. There is no statement in the report that actual negligence is necessary to charge the innkeeper, or that he can discharge himself by showing that the goods were not lost by his actual negligence.

The language of the old writ has sometimes been made the ground of an inference that there must be actual negligence to charge an innkeeper. The writ recites, "that by the custom of the realm, innkeepers are bound to keep the goods of their guests within their common inn, without subtraction or loss, night and day, *ita quod pro defectu hujus modi hospitatorum sed servientium suorum*"—no damage shall in any manner befall such guest. The innkeeper is bound to keep the goods of his servants. The argument is, that the term *pro defectu* implies actual fault and negligence. But the innkeeper is sued for neglecting to perform his legal duty, and the question occurs. What is the duty which the law and the custom of the realm imposes on him? If the law holds him to keep the goods of his guest at all events, except in case where the loss happens by the act of God or the public enemy, or by the fault of the guest, then if the goods are lost by mere accident, or by robbery, without any want of actual care on his part, the innkeeper has still failed to perform his legal obligation, and the goods are lost by his neglect and failure to perform the duty which the law imposes. The law, in such case, charges the innkeeper with the duty of keeping the goods safely, and imputes to him the fault, if they are lost or damaged.

In this view of their meaning these words of the writ are by no means idle and unmeaning because the innkeeper is not in all cases liable for the loss of goods intrusted to his care. The loss may happen by the act of God, by the public enemy, or by the fault of the owner, and

in that case the damage does not happen by the default of the innkeeper. If the declaration should merely allege that the goods were lost or damaged, without averring that the loss or damage happened by default of the innkeeper or his servants, it is apprehended that it would be substantially defective, and bad on demurrer, on the strictest rule which has been applied to the innkeeper's liability.

This argument, from the form of pleading, might be urged with equal force to show that a common carrier is only liable for loss that happens by his actual negligence. In the settled form of declaring in a case against a carrier, it is alleged that the defendant, "neglecting his duty in that behalf, did not safely and securely carry," etc., "but so negligently and improperly conducted himself that by and through the negligence, carelessness, and default of the defendant," the goods were lost or damaged: *Angell on Carriers*, 429, note; *Raphael v. Pickford*, 5 Man. & G. 551, 2 Ch. Pl. 271, 272.

Three different rules appear to be laid on this subject in different authorities.

1. That the innkeeper is *prima facie* liable for the loss of goods in his charge; but may discharge himself by showing that the goods were not lost by his negligence or default, and this is the ground taken by the defendant in the present case. This view of the law is sustained by *Dawson v. Chamney*, 5 Ad. & El., N. S. 165, and by *Metcalf v. Hess*, 14 Ill. 129.

2. That the innkeeper is discharged by showing how the accident happened and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominated the act of God, and the force might not be the power of a public enemy. This rule is countenanced by *Merrit v. Claghorn*, 23 Vt. 177, and *Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. D. 416.

3. That the innkeeper is liable, unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest. This rule is maintained in *Burgess v. Clements*, 4 Mau. & Sel. 306; *Richmond v. Smith*, 8 Barn. & Cress. 9; *Farnworth v. Packwood*, 1 Stark. 249; *Kent v. Shuckard*, 2 Barn. & Ad. 803; *Armistead v. White*, 6 Eng. L. & Eq. 349; *Mason v. Thompson*, 9 Pick. 280, 20 Am. D. 471; *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628.

Of text-writers, Story, though with hesitation, goes for the first rule. Kent states the third rule strongly, and Metcalf adopts the same and the civil law places the liability of the innkeeper and the common carrier on the same footing.

It is somewhat singular that on a practical question, which must be as old as the rudiments of the law, there should be found at this day such di-

versity of opinion and decision. It is probably owing to the obscure way in which the subject is treated in the report of Calye's Case, 8 Co. 32, and the different interpretations which have been put on that case. On the whole, we think that the better rule is the strict one as laid down in the elaborate and very satisfactory case of *Shaw v. Berry*, supra. The weight of authority is heavily that way, and the policy and analogies of the law lead to the same conclusion.

Judgment on the verdict.

SLEEPING CAR COMPANY IS NOT LIABLE AS AN INNKEEPER

PULLMAN PALACE CAR CO. v. SMITH

73 *ILL.* 360 (1874)

Smith bought of defendant car company a sleeping car ticket from Chicago to St. Louis. During the trip \$1,180 was stolen from his pocket. The court below instructed the jury that, if they found that plaintiff while sleeping in defendant's car on the trip was robbed as charged, they should find a verdict for him in such sum as they considered an ordinary and reasonable sum for a traveler to carry, for traveling purposes only, upon such a journey, with interest at six per cent for fourteen months. Verdict of \$277 for plaintiff.

SHELDON, J. The instruction which the court gave to the jury made the company responsible as insurer for the safety of the money, imposing upon it the severe liability of an innkeeper or common carrier, and it is the position which appellee's counsel take, that the relation between the parties in this case was that of innkeeper and guest, and that the liability of the company is that of an innkeeper.

In order to ascertain whether the extraordinary responsibility claimed here exists, it becomes important to inquire into the nature of inns and guests, where this liability was imposed by the common law, and see whether the description of the same property applies here.

Kent, in defining an inn, says: "It must be a house kept open publicly for the lodging and entertainment of travelers in general, for reasonable consideration. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn." 2 Kent's Com. 595. This is substantially the same definition as is given in all the books upon the subject.

But the keeper of a mere coffee-house, or private boarding or lodging-house, is not an innkeeper, in the sense of the law. *Id.* 596: *Dansey v. Richardson*, 3 Ellis & B. 144; *E. C. L.*, vol. 77; *Holder v. Souldby*, 98

E. C. L. 254; *Kisten v. Hildebrand*, 9 B. Monr. 72, 48 Am. D. 416. It must be a common inn, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons who are lodgers. Story on Bailm. § 475, and cases cited in note. The duty of innkeepers extends chiefly to the entertaining and harboring of travelers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if one who keeps a common inn refuses either to receive a traveler as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 3 Bac. Abr., Inns and Innkeepers, C. The custody of the goods of his guest is part and parcel of the innkeeper's contract to feed, lodge and accommodate the guest for a suitable reward. 2 Kent's Com. 592.

From the authorities already cited, it is manifest that this Pullman palace car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company, that of an innkeeper.

It does not, like the innkeeper, undertake to accommodate the traveling public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class, those who have already paid their fare and are provided with a first-class ticket, entitling them to ride to a particular place.

It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is a dining car attached to the train, as shown, but not owned by the Pullman Company, nor run by them. It belongs to another company, the Chicago and Alton Dining Car Association. Appellant, as we understand, furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. We would not have it implied, however, that even were these eating accommodations furnished by appellant, it would vary our decision; but the not furnishing entertainment is a lack of one of the features of an inn.

The innkeeper is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey. Appellant does not receive pay for, nor undertake to care for, any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made.

The same necessity does not exist here, as in the case of a common inn. At the time when this custom of an innkeeper's liability had

origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But here, the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car; and there were easy methods within his reach by which both money and baggage could be safely transported. On the train which bore him were a baggage and express car, and there was no necessity of imposing this duty and liability on appellant.

It cannot be supposed that any such measure of duty or liability attached to appellant, as is declared in the quotation cited from Bacon's Abridgment to belong to an innkeeper. The accommodation furnished appellee was in accordance with an express contract entered into when he bought his berth ticket at Chicago, which was for the use of a specified couch from Chicago to St. Louis, and appellant did not render a service made mandatory by law, as in the case of an innkeeper.

But if it should be deemed that, on principle merely, this company would be required to take as much care of the goods of a lodger, as an innkeeper of those of a guest, the same may be said with reference to the keeper of a boarding house, or of a lodging house. In *Dansey v. Richardson*, *supra*, where the innkeeper's liability was refused to be extended to a boarding-house keeper, it was said by Coleridge, J.: "The liability of the innkeeper, as, in deed, other incidents to his position, do not, however, stand on mere reason, but on custom, growing out of a state of society no longer existing." In *Holder v. Toulby*, *supra*, where it was held the law imposed no duty upon a lodging-house keeper to take due care of the goods of a lodger, Calye's case, 8 Co. Rep. 32, was designated as *fons juris* upon this subject, where it was expressly resolved, that, though an innkeeper is responsible for the safety of the goods of a guest, a lodging-house keeper is not. And in *Parker v. Flint*, 12 Mod. 255, "if," says Lord Holt, "one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection; but if he eat or drink there, it is otherwise, or if he pay for his diet there, though he do not take it there."

The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company; and if appellant were a carrier, it would not be liable for the loss in this case, because the

money was not delivered into the possession or custody of appellant, which would be essential to its liability as carrier. *Tower v. The Utica and Schenectady Railroad Co.*, 7 Hill, 47, 42 Am. D. 36. In *Redf. Am. Railw. Cases*, 138, it is said: "But it has never been claimed that the passenger carrier is responsible for the acts of pickpockets at their stations, or upon steamboats and railway carriages."

It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses through collusion, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe-keeping by himself, and we think his must be the responsibility for its loss.

We hold the instruction to be erroneous, and the judgment of the court below will be reversed, and the cause remanded.

Judgment reversed.

COMMON CARRIERS

WHERE THE OWNER OF A SLOOP CARRIED GRAIN OCCASIONALLY FOR OTHER PERSONS, AND NOT AS A PUBLIC BUSINESS, HE IS NOT A COMMON CARRIER

ALLEN V. SACKRIDER

37 N. Y. 341 (1867)

PARKER, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants to be transported from Trenton, in the province of Canada, to Ogdensburgh, in this state, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The plaintiffs in the fall of 1859 were partners, doing a business at Ogdensburgh. The defendants were the owners of the sloop *Creole*, of which Farnham was master. In the fall of 1859, the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at \$100 for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of \$1,346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident or what in law is termed the act of God. From these facts my conclusions of law are that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and therefore the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not I think make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the

plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of the sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined in *Gisbourn v. Hurst*, 1 Salk. 249, to be "any man undertaking for hire, to carry the goods of all persons indifferently;" and in *Dwight b. Brewster*, 1 Pick. 50; 11Am. Dec. 133. to be "one who undertook for hire to transport the goods of such as choose to employ him from place to place." In *Orange Bank v. Brown*, 3 Wend. 161, Chief Justice Savage said: Every person who undertakes to carry for a compensation, the goods of all persons indifferently, is as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is to all persons who choose to employ him, as ready to carry for hire; while the latter agrees in some special case with some private individual to carry for hire." Story Cont., paragraph 752, a. The employment of a common carrier is a public one, and he assumes a public duty and is bound to receive and carry the goods of any one who offers. "On the whole," says Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." 2 Pars. Cont. (5th ed) 166, note.

The learned counsel for the appellant on effect recognizes the necessity of the carrier holding himself out to the world as such in order to invest him with the character and responsibilities of a common carrier; and to meet that necessity says: "The Creole was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and therefore can not, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable unless as common carriers. Very clearly they were not common carriers; and the judgment should therefore be affirmed.

All concurring.

Judgment affirmed.

IT IS THE DUTY OF A RAILROAD COMPANY ENGAGED AS
A COMMON CARRIER OF LIVE STOCK TO FURNISH A
SUFFICIENT NUMBER OF SUITABLE CARS TO SHIPPERS
ON REASONABLE NOTICE OF WHAT IS REQUIRED

AYRES v. CHICAGO AND NORTHWESTERN RAILWAY CO.

71 Wis. 372. 37 N. W. R. 432 (1888)

Action against defendant as a common carrier of live stock for damages due to delay in furnishing seven cars ordered for the shipment of live stock. Two cars were furnished at the required time, but the other five were not, nor was plaintiff notified that the cars could not be furnished as ordered, in consequence of which he brought sufficient live stock to the stations to load all the cars. Verdict of \$825.97 for plaintiff because of cost of care and feeding, and depreciation in value and shrinkage due to the delay.

CASSODAY, J. There is no finding of any agreement on the part of the defendant to have the cars in readiness at the stations on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said: "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the stations named, as ordered by the plaintiffs, and in the absence of any contract to do so.

In *Richardson v. Chicago etc. R'y Co.*, 61 Wis. 601, 18 Am. & Eng.

R. R. Cas. 530, 21 N. W. R. 49, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock to exempt itself by express contract "from damage caused wholly or perhaps in part by the instincts, habits, propensities, wants, necessities, vices or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier upon mere notice to furnish cars, and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others."

In that case, there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to and did submit to the terms and conditions of carriage imposed by the defendant by signing the special contracts mentioned. It must be assumed also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with

unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument.

We are therefore forced to the conclusion that, at the time the plaintiffs applied for the cars, the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire, upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in *Richardson v. Chicago etc. R'y Co.*, *supra*, and is supported by the logic of numerous cases: *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727, 8 S. Ct. R. 266; *Moulton v. St. Paul, etc. R. R. Co.*, 31 Minn. 85, 16 N. W. R. 497, 12 Am. & Eng. R. R. Cas. 13; *Lindsley v. Chicago etc. R. R. Co.*, 36 Minn. 539, 32 N. W. R. 7; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 15 Am. R. 19; *Kimball v. Rutland, etc. R. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Rixford v. Smith*, 52 N. H. 355, 13 Am. R. 42; *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *South & N. A. R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. R. 578; *Baker v. L. & N. R. R. Co.*, 10 Lea, 304, 16 Am. & Eng. R. R. Cas. 149; *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209, 40 Am. R. 415; *McFadden v. M. P. R. R. Co.*, 92 Mo. 343, 4 S. W. R. 698, 3 Am. & Eng. Cyclop. Law, 1-10, and the cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligations is to carry according to his public profession:" *Johnson v. Midland R. R. Co.*, 4 Ex. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier: *Texas etc. R. R. Co. v. Nicholson*, 61 Tex. 491; *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. R. 70; *Ballentine v. N. M. R. R. Co.*, 40 Mo. 491, 93 Am. D. 315; *Guinn v. W. St. L. & P. R. R. Co.*, 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The

plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road.

It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is, whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court,

even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff: *Hepler v. State*, 58 Wis. 46, 16 N. W. R. 42. But it has been held otherwise where the only proof is peculiarly within the control of the defendant: *Mecklen v. Blake*, 16 Id. 102, 82 Am. D. 707; *Beckman v. Henn*, 17 Id. 412; *Noonan v. Ilsley*, 21 Id. 144, 84 Am. D. 742; *Great Western R. R. Co. v. Bacon*, 30 Ill. 352, 88 Am. D. 199; *Brown v. Brown*, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were, at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated, was as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live-stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did, to wit, Thursday, October 19, 1882, A.M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613; 33 Am. R. 70. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error,

and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the Court. Ordered accordingly.

AMONG CONNECTING LINES, THE CARRIER IN WHOSE HANDS THE GOODS IS FOUND DAMAGED, IS PRESUMED TO HAVE CAUSED THE DAMAGE, AND THE BURDEN IS ON SUCH CARRIER, TO REBUT THE PRESUMPTION

MORGANTOWN MANUFACTURING CO. V. OHIO RIVER AND CHARLESTON RAILWAY CO

121 N. C. 514 (1887)

FAIRCLOTH, C. J. A box of plate glass was shipped from New York City to Marion, North Carolina. The Pennsylvania Railroad Company, the initial carrier, received and transferred the case to the Norfolk & Western Road at Hagerstown. Then the car containing the box was transferred at Roanoke to the Cape Fear & Yadkin Valley Road and by them brought to the Seaboard Air Line Road at Sanford with the seal of the latter on the car at Shelby, North Carolina. At that place the agent of the defendant broke the seal and checked off the contents of the car on the waybill and examined the box and found it in apparent good order. He said in his testimony that there were no marks of rough usage on the outside of the box—that he took a copy of the waybill and delivered it to the defendant's conductor, who carried the car and copy of the waybill to Marion, and that he (the agent) marked the waybill O.K. also that he did not examine the contents of the box, and that his company did not require him to give a receipt for freight transferred to defendant from connecting lines. The defendant's agent at Marion testified that he received the box, and that the glass was not damaged in taking it off the car, nor while it was in the depot at Marion; that ten days thereafter he and plaintiff's agent opened the box and found the glass badly damaged. A contractor and builder examined the box, and said it must have fallen and struck something hard, causing the break in the glass.

The agent of the first carrier at New York sent a bill of lading with the package, stamped on its face "Released," and gave a receipt for the box "in apparent good order (contents and condition of contents unknown) to be transported to and delivered at the regular freight station of the company at . . . , subject to all the conditions," etc., among which were these words: "No carrier shall be liable for loss

or damage not occurring on its own road or its portion of the through route," etc. This action is against the terminal carrier.

The defendant contends that it is not liable unless it be shown that the damage occurred on its line, and that there is no evidence that that was so.

We understand "released" to mean exemption from the common-law liability as an insurer. It seems to be agreed that O. K. means all right or in good condition: *Baxter v. Ellis*, 111 N. C. 124. It must be admitted that the present system of rapid transit, consisting of through lines, connecting lines, associated lines, and the like, makes it difficult in some cases to locate the line on which the damage occurs, and it would seem practicable for the interested lines to make some arrangement for their own benefit and the public convenience by prorating the freight charges and also the damages, when they cannot be located, and thereby avoid the inconvenience of actual inspection at every transfer, which would not only be inconvenient and cause much delay but serious loss to the consignee.

This case illustrates the difficulty. The glass, being very thick, could not have been broken without a severe jar, and, looking at the evidence, it is scarcely possible to see where or how it occurred.

The case does not fall within the principle of *Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693, 25 S. E. R. 854, 56 Am. St. Rep. 682, where it was held that the associated companies were partners, and each one liable for the negligence of either of the other lines. We are not required to discuss the liability of the other lines which handled the package of glass. The first discovery of damage was when the goods were at the terminal point of the defendant's line.

A bill of lading is something more than a simple receipt. It is a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing cannot be explained by parol evidence, and thereby change its legal import, in the absence of fraud or mistake. It also, by the terms of the writing, as in this case, excludes the common-law liability of the carrier, because it is a special contract governed by its own limitations. The bill, as a receipt, is an acknowledgment of the quantity, character, and condition of the articles delivered and received, and as such may be explained, varied, or contradicted like other receipts. This exemption from the common-law liability may be enforced, if it be reasonable and does not involve exemption from negligence. *Ray's Negligence of Imposed Duties*, 93-95; *Pollard v. Vinton*, 105 U. S. 7; *Elliot on Railroads*, sec. 1415.

The defendant's agent having received the box apparently in good condition and marked the bill of lading "O.K." was an adoption of the terms and conditions specified in writing by the initial carrier, and these facts raise a rebuttable presumption that the damage occurred thereafter. The defendant endeavored to meet and overcome this presumption with evidence, and went to the jury with his evidence. The court charged the jury that among connecting lines the carrier, in whose hands the property is found damaged, is presumed to have caused the damage, and that the burden is upon the defendant to rebut this presumption and satisfy the jury that the glass was not damaged in its possession. In response to the inquiry of the jury, the court charged them that, if the condition of the contents was unknown to the defendant, liability could have been guarded against by examination or stipulation, and that failure to do so was negligence. This we think was correct according to the authorities and the facts.

The instructions asked for by defendant were not suited to the facts, and ignored the presumption just pointed out, and were properly refused. It has been held that the stipulation above stated is a reasonable one and consistent with public policy: *Phifer v. Carolina Cent. R. R. Co.*, 89 N. C. 311, 45 Am. Rep. 687. It has also been held by this court that, if the contents and their condition be unknown, liability may be avoided by examination or by a stipulation, and that it is negligence in a receiving line not to observe these precautions: *Dixon v. Richmond, etc., R. R. Co.*, 74 N. C. 538.

Affirmed.

AN EMPLOYEE OF A RAILROAD COMPANY, WHO RIDES TO
AND FROM HIS WORK ON A MONTHLY TICKET FURNISHED BY THE COMPANY, IS A PASSENGER

DOYLE V. FITCHBURG RAILROAD CO.

162 Mass. 66; 37 N. E. R. 770 (1894)

Tort for damages for death of Cornelius J. Doyle, who was employed by defendant railroad. He lived in Waltham with his father, riding back and forth daily on a monthly ticket which the carrier was accustomed to furnish to its employees living outside the city, and which contained on its back a condition that the free ticket is accepted on the express agreement that the company should not be a common carrier as to him, or liable under any circumstances, whether negligence of agents or otherwise, for injury to the person or property of the passenger confined to the day between 7 a.m. and 6 p.m. At 10 p.m., while

returning from Boston on business of his own, he was killed in a collision due to the gross carelessness of the engineer. To a refusal of the court to rule that plaintiff could not recover defendant excepted.

MORTON J. It is conceded that the death of the plaintiff's intestate was due to the gross negligence of an engineer in the employ of the defendant. The defense rests on two propositions: 1. That the plaintiff's intestate was not a passenger, but an employee; 2. If that is not so, that the defendant is not liable by reason of the conditions on the back of the ticket.

We do not think that at the time of the injury the plaintiff's intestate was "in the employment" of the defendant within the meaning of the statute. The defendant was not transporting him to or from the place of his daily labor, pursuant to the arrangement which existed between them. It had no control or authority over him. He was not traveling on any service for it, and he could use it as he saw fit, and he was passing over the defendant's road entirely for his own business or pleasure. So long as he was working from day to day for the defendant, it might be said, in a popular sense, that he was in its employment. But we do not think that is the sense in which the words are used in the statute. Otherwise, if at any time, under any circumstances, passing over the railroad on a highway crossing on Sunday, for instance, on an errand to get a doctor for his father or a friend, he was injured by the gross negligence of the defendant's servants while engaged in its business, he would have no right of recovery. Nothing but the plainest language would warrant such a construction.

Was he a passenger? This question is a more difficult one, and there is force in the argument that to hold that he was a passenger would subject the defendant to a higher degree of care toward him when traveling on its road on his own pleasure than when traveling pursuant to some purpose connected with his service as an employee. Nevertheless, we think that he must be regarded as having been a passenger. It is clear that a person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in traveling to and from work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held toward the defendant the relation of

a passenger at the time when he was injured. The cases to which the defendant has referred us are distinguishable from this. Those in this state were where the plaintiff was being transported in immediate connection with his employment. *Gillshannon v. Stony Brook R. R. Corp.*, 10 Cush. 228; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray, 466; *Gilman v. Eastern R. R. Corp.*, 10 Allen 233, 87 Am. Dec. 235; *O'Brien v. Boston & Albany R. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279. In the cases in other states the circumstances under which the injuries occurred were such that the plaintiff could at the time fairly be said to be in the employ of the defendant: *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Vick v. N. Y. Cent. etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Abend v. Terre Haute etc. Ry. Co.*, 17 Am. & Eng. R. R. Cas. 614; *International etc. Ry. Co. v. Ryan*, 82 Tex. 565, 18 S. W. R. 219; *Kansas City etc. R. R. Co. v. Phillips*, 98 Ala. 159, 13 So. R. 65; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. R. 123; *Evansville etc. R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. R. 345; *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417; *O'Connell v. Baltimore etc. Ry. Co.*, 20 Md. 212; 83 Am. Dec. 549; *Hutchinson v. York etc. Ry. Co.*, 5 Ex. 343; *Tunney v. Midland Ry. Co.*, L. R. 1 Com. P. 291.

In considering the contract on the back of the ticket, the fact that the statute is a penal one must also be borne in mind. The word "damages" is not used in a strictly legal sense; *Sackett v. Ruder*, 152 Mass. 297, 413, 25 N. E. R. 736. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants, or agents. Originally the remedy was by indictment. Afterward it was extended to an action of tort: Stats. 1871, c. 381, sec. 49; Stats. 1874, c. 372, sec. 163; Stats. 1881, c. 199, secs. 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the amount is recovered by indictment or in an action of tort, it goes in either case to the widow and children and next of kin, and the executor or administrator has no interest in it. It is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it: *Commonwealth v. Vermont etc. R. R. Co.*, 108 Mass. 7, 12, 11 Am. Rep. 311; *Commonwealth v. Boston etc. R. R. Corp.*, 134 Mass. 211; *Littlejohn v. Fitchburg R. R. Co.*, 148 Mass. 478, 482, 20 N. E. R. 103. Save as a matter of convenience, the proceedings properly enough might be instituted by the widow and children or next of kin, if the statute permitted it, as is done in certain instances under the employers' liability act: Stats. 1887, c. 270, sec. 2. We have not found it necessary to con-

sider whether a release of damages for causing the death of a human being is or is not justified by public policy, though a statute has been enacted recently which seems to authorize such a release by express messengers: Stats. 1894, c. 469, sec. 2. Upon that, however, we express no opinion. The result is that we are of opinion that the exceptions must be overruled, and it is so ordered.

IT IS THE DUTY OF A CARRIER OF PASSENGERS TO BRING
THE TRAIN TO A STANDSTILL AND ALLOW THE
PASSENGERS AMPLE TIME TO GET OFF

FILER V. NEW YORK CENTRAL RAILROAD CO.

49 N. Y. 47 (1872)

Action for damages for injuries permanently disabling defendant. The train slowed up at her station, but did not stop. A brakeman said to her, "You had better get off; they are not going to halt any more." She tried to get off, but her skirts caught and she was dragged some distance, receiving painful and permanent injuries. A judgment for plaintiff was affirmed by the Supreme Court, and appeal was then taken to the Court of Appeals.

ALLEN, J. It was submitted to the jury, if they found that the plaintiff was directed by the brakeman to leave the cars or get off when the cars were in motion, to determine whether under the circumstances there was any such negligence on her part as would preclude her from recovering; the judge having in substance instructed the jury that if a person seeks to recover for injuries resulting from the negligence of another, he must himself be free from any negligence contributing to the injury. The question was put to the jury whether the plaintiff acted as prudent persons generally would have acted under the circumstances, and the charge was that, if she did, that would not bar a recovery.

There is no complaint of the manner in which the question as to the alleged contributory negligence of the plaintiff was submitted to the jury, if there was any question for submission. The claim of the defendant, is, that the complaint should have been dismissed or a verdict ordered against the plaintiff upon the ground that she was culpably careless and negligent, and that, there being no dispute as to the facts, the question was one of law for the court and not of fact for the jury.

Ordinarily the question of negligence is one of mixed law and fact, and it is the duty of the court to submit the same to the jury, with proper instructions as to the law. What is proper care is sometimes a question

of law, when there is no controversy about the facts; but where there is evidence tending to prove negligence on the part of the defendant and a question arises whether the plaintiff has by his own fault contributed to the injury, it is ordinarily a question for the jury. If the evidence is of that character that a verdict for the plaintiff would be clearly against evidence, the question is one of law and should be decided by the court.

The fact is undisputed that the plaintiff received the injury while attempting to get off the cars while they were in motion, making very slow progress, and the jury found that she was directed by the brakeman on the cars to get off and was told by him that they would not stop or move more slowly to enable her to do so. That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of the duty it owed her, not to stop the train entirely and give her ample time to pass off with her luggage, is not disputed. Notwithstanding this, if the plaintiff did not exercise ordinary care, and might with ordinary care and prudence have avoided the injury, she is precluded from recovering.

The degree of negligence of which the parties are respectively guilty, or whether the fault of the defendant was a breach of contract or the mere omission of some duty resting upon it as a carrier of passengers, is not material.

■ The plaintiff's negligence may have been slight and that of the defendant what is ordinarily termed gross; but if the plaintiff's fault directly and proximately contributed to the injury, she cannot recover.

Indeed, it is now said that there is no difference between negligence and gross negligence, the latter being nothing more than the former, with a vituperative epithet. *Grill v. Iron Screw Collier Co.* L. R. 1 C. P. 600; *Wilson v. Brett*, 11 M. & W. 113.

That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act or whether it was a rash and reckless exposure of the person to peril and hazard.

The plaintiff had purchased a ticket and taken passage for Fort Plain, at which place this train was advertised to stop and, on approaching the station, the name of the place was called as a notice to the passengers intending to leave the train at that place to be prepared to get off, which was equivalent to notice that proper time and facilities would be

afforded them for their passage from the cars, and the speed of the cars reduced very greatly, so that the baggage was removed and taken from the baggage car by the porter; one man, supposed to be a little lame, had gotten off safely.

The plaintiff was told that the cars would not make any other stop, and that she must get off there, and in attempting to do so she was injured.

She was put to her choice, without any fault of hers, whether to obey the advice and suggestion of the defendant's servant, and follow the example of the man who had preceded her, or to remain on the cars and be carried beyond the place of her destination, and away from her friends, and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence.

It is true, there was no absolute necessity for this act; but she was called upon to decide upon the instant and under peculiar circumstances, and ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong. If, in leaving the cars, she did not exercise the care and caution which she might, and ought to have done and was careless and negligent in her movements, or in the care of her dress, and by reason of such want of care caused or contributed to the injury, she ought not to recover; but no question was made at the trial upon this branch of the case, except upon the effect of her leaving the cars when in motion.

Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured by leaping from them, and the attempt to leave the cars, under such circumstances, even at the instance of the railway servants, would have been a wanton and reckless act and no recovery could have been had against the defendant. In *Lucas v. New Bedford and Taunton R. R. Co.*, 6 Gray, 64, 66 Am. D. 406 the plaintiff had accompanied a friend to the cars and remained with her until the train had started, and then of her own volition attempted to leave and received an injury, and it was held that her own act was the cause of the injury, and that the defendant was in no respect in fault.

In *Hickey v. Boston and Lowell R. R. Co.*, 14 Allen, 429, the plaintiff's intestate took a position upon the platform of a car as it was coming into a station, where he was exposed to danger, voluntarily and without reasonable cause of necessity or propriety, and it was properly held that the express or implied assent and permission of the conductor of the train did not change the relation of the parties and relieve the deceased from the consequences of his own want of care. *Railroad Co. v. Aspell*, 23 Penn. 147, 62 Am. D. 323, differed essentially in all its circumstances from the case at bar. The plaintiff there leaped in the dark from a train

of cars while under a high rate of speed, against the remonstrances of the persons in charge of the train, and under an assurance that the train would be stopped to permit him to alight. It was properly held a wanton and reckless act, precluding a right to recover against the railroad company. In the same case the principle was recognized that if a passenger was ordinarily careful and attentive to his own safety, and was injured by the negligence of the company, he might recover. The Penn. R. R. Co. v. Kilgore, 32 Penn. 292, 72 Am. D. 787, is more analogous to the case in hand. A female passenger, accompanied by three young children on arriving at an intermediate station proceeded to alight with them. Two of the children had left the car, and while the plaintiff was still upon the train the cars started, when she sprang upon the platform on which one of the children had fallen prostrate and was injured. She was allowed to recover. It was held that the question of concurrent negligence was to be determined by the particular circumstances of the case. There, as in this case, the defendant had involved the plaintiff in the attempt to get off the cars; and her efforts, made with proper care under all the circumstances cannot be imputed to her for negligence.

It is not denied that the attempt to leave the cars while they are in motion is wrong. But as said by Judge Woodward, in the case last cited, "it is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed."

McIntyre v. N. Y. C. R. R. Co., 37 N. Y. 387, is, in principle, analogous to this, and a recovery was had for injuries received by a passenger in passing in the evening, and under circumstances increasing the hazard of the undertaking from one car to another while the train was in motion, the attempt having been made by direction of the defendant's servants, and to obtain a seat which could not be had in the car in which the passenger was. A passenger voluntarily and without necessity making such an attempt and receiving an injury, would be held to be at fault and without remedy; but the peculiar circumstances of the case took it out of the general rule. In Foy v. London, Brighton and South Coast R. R. Co., 18 C. B., N. S., 225, a recovery was had for an injury received in alighting from the cars, caused by the insufficient means for alighting furnished by the company, although the hazard of the attempt was as patent to the plaintiff as to the servants of the company. The jury there found that the defendant was guilty of negligence in not having provided conveniences for getting down from the carriage, and negatived the claim that the passenger contributed to the accident.

The court in banc sustained the recovery and refused leave to appeal, saying: "We do not think this a fit case to appeal." In that case, the

lady was desired by a porter in the employ of the company to alight; and that circumstance was held by the court to distinguish it from a subsequent case. *Siner v. G. W. R. Co.*, L. R., 3 Exch. 150; affirmed in Exchequer Chambers, 17 W. R. 417.

The case was similar in all its circumstances to *Foy's Case*, except there was no direction or request by the company's servants to the lady to get down from the carriage. The court held, against the dissent of *Kelley, C. B.* in the court of exchequer, and *Justice Keating*, in the exchequer chambers, that there was no evidence of negligence to go to the jury. Chief Baron Kelly was of the opinion that the stopping of the train, without any notice to the passengers to get out, was an invitation to them to do so; that the descent, although dangerous, was not so clearly dangerous that the plaintiff might not properly encounter the risk; and that the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. The reasoning of the chief baron applies with force to this case, and is in harmony with *McIntyre v. N. Y. C. R. R. Co.*, *supra*. The danger here was not certain, and the defendant cannot complain that the plaintiff did, under the circumstances, encounter some degree of peril, the jury having found that it was not imprudent for her so to do, and was encountered at the instance of the brakeman on the cars.

If the injury was caused by the awkward and careless manner in which the plaintiff got down from the cars, a different question would be presented. The motion for a nonsuit was properly denied.

Upon the question of damages, the jury were instructed to give the plaintiff, if the questions of fact were found in her favor, such an amount of damages as they thought she was entitled to for the pain and suffering consequent upon her injury, and for any disqualification for labor in the exercise of her natural powers. A distinct exception was taken to that part of the charge which included, as an item of damages proper to be allowed, the plaintiff's disqualification to labor. The attention of the court being distinctly called to the precise point presented, an opportunity was given to qualify the charge and limit its application, if any thing less was intended than the language would clearly import.

It was not qualified or explained, and must be held as an instruction, that the plaintiff was entitled to recover consequential damages resulting from her inability to labor. That was put forth as a distinct item of damages proper to be allowed, and was not referred to as evidence of the extent of the injury and consequent pain and suffering.

There was no claim that the plaintiff was, at the time of the injury

carrying on any business, trade or labor, upon or for her sole and separate account. Her services and earning belonged to her husband; and for loss of such services, caused by the accident, he may have an action and another record before us shows that he has recovered for them as he lawfully might do. Reeves Dom. Rel. (Parker's ed.) 138, and cases cited, marg. p. 63. The laws of 1860, chap. 90, permit a married woman to carry on any trade or business, and perform any labor or services on her sole and separate account and give to her her earnings from her trade, business, labor or service, and she is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury, and for the direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss.

The amendatory act of 1862, chap. 172 does not enlarge the rights of the wife, or detract from the rights of the husband, or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another.

Consequential damages are in all cases limited to the amount actually sustained; and unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages; she has lost nothing pecuniarily by reason of her inability to labor. The recovery was large, and was probably affected by the instruction that the inability of the plaintiff to labor constituted one of the items of damage to be taken into account by the jury.

For this error, in the charge, the judgment should be reversed and a new trial granted.

All concur, Church C. J. not sitting.

**COMMON CARRIERS CAN NOT BY PUBLIC NOTICE LIMIT
THEIR LIABILITY TO LOSSES WHICH ARISE FROM THE
NEGLIGENCE OF THEIR OFFICERS OR SERVANTS**

HALE V. NEW JERSEY STEAM NAVIGATION CO.

15 Conn. 539 (1843)

WILLIAMS, C. J. This suit was brought for two carriages, shipped on board the *Lexington*, against the defendants, as common carriers, to be transported in said boat for hire, from New York to Boston or Providence. The boat and goods were destroyed by fire in the sound, and a verdict being given for the plaintiff, the defendants excepted to the charge and claimed:

1. That they were not common carriers, nor subject to the rules that govern common carriers. It was long since settled, that any man, undertaking for hire to carry the goods of all persons indifferently, from place to place is a common carrier; *Gisbourn v. Burst* 1 Salk 249. Common carriers, says Judge Kent, consist of two distinct classes of men, viz. inland carriers by land or water, and carriers by sea, and in the aggregate body are included the owners of stage-coaches, who carry goods, as well as passengers, for hire, wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water craft, including steam vessels, and steam towboats belonging to internal, as well as coasting and foreign navigation, lighterman, and ferrymen; 2 Kent's Com. 598, 2d ed. And there is no difference between a land and a water carrier, *Proprietors of Trent Navigation v. Wood*, 3 Esp. Cas. 127; *Elliott v. Rossell*, 10 Johns. 7, 6 Am. Dec. 306; *Story on Bail*. 319, 323.

But it is said the rule established is a harsh one, and ought not to be extended. Chancellor Kent takes a very different view of it. He speaks of it as a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation: 2d vol. 602; and with similar views, this court has said, we are not dissatisfied with the reasons which originated the responsibility of common carriers and believe they apply, with peculiar force, at this day, and in this country as it respects carriers by water, more especially upon which element of spirit of dangerous adventure has grown up, which disregard the safety, not of property merely, but of human life; *Crosby v. Fitch*, 12 Conn. 419, 31 Am. Dec. 745. And while we are not called upon to extend the principle, we can not yield to the argument that common carriers are not to be responsible when the loss arises from the producing agent of the propelling power.

If the defendants are common carriers, the question must be merely what are the liabilities of common carriers? The answer is, for all losses, even inevitable accidents, except they arise from the act of God, or the public enemy: 2 T. R. 34; 2 L d. Raym. 918. And by the act of God is meant something superhuman, or something in opposition to the act of man: *Forward v. Pittard*, 1 T. R. 33. In all cases except of that description, the carriers warrant the safe delivery of the goods: per Kent, C. J., *Elliot v. Rossell*, 10 Johns. 7, 6 Am. D. 306; and masters and owners of vessels are liable as common carriers, as well at sea as in port. And the chief justice says that the argument is not well supported, that this doctrine of the liability of the carriers, is, by the common law of England, to be confined to transportations by water, without the jurisdiction of the realm. All the books and all the cases, which touch the subject, lay down the rule generally, and apply it, as well to ship-

ment to and from foreign ports, as to internal commerce. It is true that in *Aymar v. Astor*, 6 Cow. 269, the then chief justice, without citing a single authority, in giving the opinion of the court, says the master of a vessel, I apprehend, is not responsible, as a common carrier, for all losses, except they happen by the act of God or the enemies of the country. That case has, it is believed, never been treated as law in New York, or elsewhere. It is, indeed, repugnant to prior decisions, says Judge Story. It is not to be taken for sound law, says Judge Kent: 12 Conn. 414. And in *McArthur v. Sears*, 21 Wend. 190, this case is treated as a confessed anomaly, and disapproved as contrary to decisions in other states, and even in their own. And in a suit against the owners of a steamboat on Lake Erie as common carriers, it was held, that nothing would excuse them, except inevitable accident, without the intervention of man, and the act of public enemies. Judge Cowen denies that this case tends to repeal the law of liability of common carriers, and treats it as turning on the exception in the bill of lading.

But it is said, there is no case where the liability is extended to fire on the high seas. If the principle covers such cases, then it is to be supposed the reason such cases are not to be found, is that they have not occurred, or were not contested. If the carrier is subjected for the loss of goods burnt on land, where he was in no fault, we see no reason for exempting the carrier at sea, under similar circumstances. We apprehend a rule of policy, Lord Mansfield says, in the case alluded to, to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carriers. He is in the nature of an insurer. Every reason here given applies as well to the owners of a steamboat as to the wagoner, whose carriage was burnt without his fault, in the barn where he placed it—the same danger of collusion, of litigation, and the same difficulty in unraveling circumstances. If the policy of the law requires that one shall be an insurer, we think the same policy requires that the other should also be so treated. And if it be true that trade will regulate itself when the rule is understood, compensation will be made, not only in proportion to the labor, but to the risk. And in a recent case in New York, steamboat owners are treated as other common carriers: *Powell et al. v. Myers*, 26 Wend. 591.

It is stated, that by the laws of Louisiana a different rule prevails in regard to steamboats; but as the laws of that state are in a great measure, founded upon the civil law, they can have but little influence here.

2. The defendants claim, in the next place, that they are not liable because of the public notice which they gave, that they would not be

responsible for losses other than what arose from the fault or negligence of their officers or servants; and they claim, that by the common law a common carrier may limit his responsibility, by express contract or by public notice given of such intended limitation; in support of which they cite many cases from the English books, where that doctrine, after some diversity of opinion, has been recognized and settled. On the part of the plaintiff, it is claimed that these decisions are modern—all since we were separated from that country—after a diversity of opinion in the English courts, and now regretted by eminent judges, and not in accordance with principles of the common law; and that they have been rejected in New York as not sound law; and that, as this contract was made in New York, its construction must be regulated by that law. It becomes necessary, therefore, to determine by what law this construction of the contract is to be governed.

It appears that this boat was in the business of transportation from New York to Providence, that the plaintiff owned carriages, which he wanted to have transported to Boston; that the defendants received them in New York, to convey them to Boston or Providence; and that they were lost in the sound off Long Island, near Huntington, and the question is by what law is this contract to be governed? The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor, that they were entered into with a view to the laws of some other state: *Bartsch v. Atwater*, 1 Conn. 409, 416; *Smith v. Mead*, 3 Id. 255, 8 Am. Dec. 183; *Brackett v. Norton*, 4 Id. 520, 10 Am. Dec. 179. There is nothing in this case, either from the location of the parties, or the nature of the contract, which shows, that they could have had any other law in view, than that of the place where it was made. Indeed, as the goods were shipped to be transported from Boston to Providence, there would be the most entire uncertainty what was to be the law of the case, if any other rule was to prevail. We have, therefore, no doubt that the law of New York, as to the duties and obligations of common carriers, is to be the law of the case. And while we agree with the defendants, that the modern English cases are as they claim, and authorized the common carrier to limit his responsibility by notice to that effect; we are equally clear, that the courts in the state of New York have taken a very different view of the subject, and held, that the rule of the common law as to the liability of common carriers, was a rule founded upon sound principles of policy, to protect the citizens from losses, the true cause of which they could seldom detect; and that it ought not, in this way, to be overthrown or evaded. In *Hollister v. Nowlen*, 19 Wend. 234, 32

Am. Dec. 455, the supreme court of that state decided, that where a stage proprietor gave notice that all baggage should be at the risk of the owner, no contract could be implied from such notice, although it was brought home to the owner. So, also, in the case of *Cole v. Goodwin et al.*, Id. 251, 32 Am. Dec. 470, a similar decision was made; and no authority or opinion in that state has been adduced to shake or invalidate these decisions. Without, therefore, giving any opinion as to the law of this state, which the case does not require, we can not, in any manner, affect the liability of these defendants, as common carriers. And these decisions are certainly supported, in a most able manner, by the learned judges who have pronounced them.

3. On the trial below, the defendants also claimed, that a bill of lading was given restricting their liability and by accepting this, the plaintiffs were precluded from any claim. On this point the judge charged the jury, that by the laws of New York, neither the notice nor the bill of lading, would change the liability of the defendants. To the last part of the charge, as well as the first, the defendants object. But as the jury have found there was no bill of lading, in this case, we do not see any necessity for discussing that question; but will barely advert to the cases in the state of New York, which show the ground upon which that opinion was based.

In *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, notice was given, that all baggage was at the risk of the owner; of which notice, it was proved, the plaintiff had knowledge. The plaintiff got out of the stage, and left his trunk, and the carriage went on, and the trunk was lost; and Bronson, J., said, the baggage of passengers; and that they can not limit their responsibility by a general notice, brought home to the employers, are now settled questions, so far as this court is concerned. And the court decided, that upon these facts, the plaintiff could recover. Judge Cowen, in an elaborate argument, held, that the restrictions imposed upon common carriers for great public objects, cannot be removed by any stipulations of the parties. It is said, from what fell from Judge Bronson (who concurred in the result), in the former case that he did not concur in this opinion. In a subsequent case of *Alexander v. Greene*, 3 Hill, 20, Judge Bronson says, it is very questionable whether innkeepers and common carriers can contract for a limited liability. And in a note, the reporter says the case of *Gould v. Hill*, 2 Hill, 623, was not then decided. It was therefore thought, by the judge who tried this cause, better that the jury should pass upon the fact, and leave the question to be examined by this court. As it is, we are not called upon to settle the law of New York on the subject; much less would we intimate an opinion, that it can be considered as the law of this state, though it is supported with great learning and ingenuity.

4. The defendants, however, claim, that the court below, aside from any question arising on the bill of lading, gave an opinion to the jury that, notwithstanding any stipulations of the parties restricting the liability of the carriers, they would be liable in this case. The judge who tried the cause below, had no idea of any question of that kind. No claim was made but what arose from the notice or the bill of lading. And we think, there is nothing upon this motion which can be fairly referred to anything else. What are the facts and claims stated in the motion? The defendants claimed, they had given public notice that they would not be liable for losses, except what arose from want of care or negligence on the part of their servants; and that their agents were not authorized to receive goods on board, without delivering a bill of lading, containing such restrictions. They further claimed, that the plaintiff knew of the notice given as above, and that they dealt with him upon that understanding. They then complain, that as to the restrictions claimed by these notices in their bills of lading, they could not, by the laws of New York, limit their liability as common carriers. This charge met all the evidence offered by the defendants; for the claim of the defendants is founded only upon the notice and the bill of lading. They do, indeed, after setting out their notice, claim, that the plaintiff dealt with them upon that understanding. By this nothing can be meant or intended, but the understanding which is implied from the notice alluded to, and any implication against the bailor, arising from such knowledge or understanding, is explicitly repelled, in the cases alluded to in *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455. We think, therefore, that the question was fully presented to the jury. They have negatived the fact as to the bill of lading; and the effect of the notice has been settled by the supreme court of the state of New York. We do not, therefore, see any ground for a new trial.

In this opinion the other judges concurred.

New trial not to be granted.

REAL ESTATE

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY

SNEDEKER v. WARING

12 N. Y. 170 (1854)

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statute and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corlies v. Van Sagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the latter authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; *Hilliard on Mortgages*, 294, note f, and cases there cited; and see *Bishop v. Bishop*, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive they passed to the defendant as part of the realty.

No case has been found in either the English or American courts deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or whatever it may be before it shall be

permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures and statues used to spout water at fountains, were regarded as immovable, or real.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap., paragraph 525. But statues standing on pedestals in house, court-yards, and gardens retain their character of "movable" or personal. 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Repertoire Generale, Journal du Palais, by Ledru Rollin, 518, paragraph 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The

reasons for the French law upon this subject are stated by the same author in the same work, page 517, paragraph 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, and the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("vide choquant"), a foundation and base no longer appropriate or useful. *Ib.*, paragraph 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament. 2 *Ledru Rollin*, *Repertoire Generale*, 514, paragraph 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its base, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest

and unmistakable evidence of intention. It was decided by the court of Cassation in France, in *Hornelle v. Enregistr*, 2 *Ledru Rollin*, *Journal du Palais*, *Repertoire*, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer house of wicker work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty as a statue would, placed on the house, or as one of two statues, placed on the gateposts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support. (See to that effect, *Oakland Cemetery Co. v. Bancroft*, 161 Pa. St. 197.)

It is said the statue and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only in their own weight. Yet that has been found sufficient to preserve many of them undisturbed for 4,000 years. *Taylor's Africa*, 113 et seq. And if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the pyramids of Egypt, or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guarantee of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except for when

firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

ESTATE BY THE CURTESY

FERGUSON V. TWEEDY

43 N. Y. 543 (1871)

FOLGER, J. This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his life time an estate as tenant by the curtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seisin, during marriage, of the premises in question. There is no dispute but all of these existed, save the last.

It is a general rule that to support a tenancy by the curtesy there must be an actual seisin of the wife: *Mercer's Lessee v. Seldon*, 1 How. U. S. 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seisin, so as to entitle the husband to a life estate in the land as a tenant by the curtesy, though he has never received or demanded rent during the life of his wife: *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife: 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry: 8 Paige, *supra*. And it has been held that where the wife takes under a deed and there is no adverse holding at the time that actual entry is not necessary: *Jackson v. Johnson*, 5 Cow. 74. But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife she did convey by quit-claim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his assign held the possession up to

her death and afterward. It is true that this deed was one of the two interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed as it was, by possession in severalty was valid and sufficient to sever the possession for the lifetime of the testator's wife: *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 21.

And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession and right of such possession for a term which ran for her life. There was then an outstanding estate for life in the premises which, beginning before her coverture began, did not end until her coverture ended. And it is settled that if there be an outstanding estate for life the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture: *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Creiger*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned Justice before whom the action was tried that the possession of the grantee in that deed and of his assign was actual and exclusive. It is found, also, that neither the wife of the testator nor the testator himself did at any time after the execution of the deed have actual possession of the premises or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the curtesy in favor of the testator.

This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the Court below should be affirmed with costs to the respondent.

**A SALE OF GROWING TIMBER IS AN "INTEREST IN LAND"
WITHIN THE MEANING OF THE FOURTH SECTION
OF THE STATUTE OF FRAUDS**

STUART V. PENNIS

See Under Contracts, Page 106

FIXTURES

MACHINERY NOT PERMANENTLY ATTACHED TO THE BUILDING, AND WHICH CAN BE REMOVED WITHOUT MATERIAL INJURY TO THE FREEHOLD IS PERSONAL PROPERTY

HILL v. WENTWORTH

28 Vt. 428 (1856)

BENNETT, J. This is a case of very considerable practical importance, and we have endeavored to give it the attention which its importance demands. The charge assumes that, if the machinery in the mill was necessary and usual for the purpose of manufacturing paper, and designed to be and remain in the mill permanently, it became a part of the realty, however slightly it may have been attached to the freehold. There are, no doubt, cases in the books which will fully warrant the charge of the Court, and of that character is the case of *Farrar v. Stackpole*, 6 Greenl. 157, to which we have been referred (and which seems to be an extreme case), while others take an opposite view, and hold that the annexation must be substantial, and such that the chattel cannot be severed without substantial injury to the freehold, beyond what shall result from the abstraction of the thing removed. The first inquiry should be, what has been the tendency of our own decisions in relation to the matter?

In *Wetherby v. Foster*, 5 Vt. 136, it was held that potash kettles, set in brick arches, in the usual manner, with chimneys to the arches, and used in manufacturing purposes, still remained personal property. The Court said, p. 142, if the kettles were fastened to the freehold at all, it was temporary merely, and the injury to the brick-work in taking them out was too trifling to designate them real estate while there. In *Tobias v. Francis*, 3 Vt. 425, the questions arose between the mortgagee and a creditor of the mortgagor, and it was held that carding machines, in a woolen factory, and connected by a band with other wheels in motion, by which they were propelled in the usual way, and which remained stationary by means of their own weight, were still personal property, and, as such, might be attached and taken away.

In *Sturgis v. Warren*, 11 Vt. 433, the question also arose between the creditors of the mortgagors and the assignee of the mortgagee, and the

carding machines were affixed to the factory building in the usual manner. some with nails, some with spikes and screws and some with cleats, and yet, upon the authority of the case of *Tobias v. Francis*, they were held to be personal property. In *Cross v. Marston*, 17 Vt. 534, the case of drawers, and the sash case were placed in a building which was fitting up for a book store. The case of drawers was nailed to the wall, and open shelves were placed in the space above. The sash of the show-case was used to cover an open book-case, which was permanently fastened to the wall of the building—the sash sliding in a place before the book-case, and being fastened in by strips of boards nailed above and below. The question arose between vendor and vendee, and the case was made to turn on the question whether the chattels had, by the manner of their annexation to the freehold, lost their personal identity as chattels, and it was held that they had not, the Court applying, as a test, the fact that the articles could have been taken out of the building without injury to themselves, or the building, which was assumed both by the counsel and the Court, although, from the report of the case, I do not see that it was a fact distinctly found in the bill of exceptions. From the cases already decided in this State, upon a subject which, from its very nature, is perplexing, and rendered more so by the conflicting views of different courts, it is quite evident our Courts have assumed the ground that a chattel is not to lose its personal identity, as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend there is no sufficient reason why we should, at the present day, recede from the ground already taken by our Courts. It is certainly sustained by many well-considered cases.

In *Swift v. Thompson*, 9 Conn. 63, the spinning frames in a cotton factory stood upon the floor and were kept in their place by means of cleats nailed to the floor around them, and there was other machinery, to the posts of which iron plates were attached, through which wood screws passed, fastening them into the floor, but by unscrewing them the machinery could be removed without injury to it or the building, and it was held that the whole machinery remained personal property. Daggett, J., says it is material to consider that the machinery was thus attached to the building to render it stable, and that the criterion established by the rules of the common law is, could this property be removed without injury to the freehold? See, also, *Taffe v. Warwick*, 3 Blackford Ill. The New York cases are very full on this point: *Cresson v. Stout*, 17 Johnson, 116; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Chauffetete*, 5 Denio, 527 and *Vanderpool v. Van Allen*, 10 Barbour, 157. So in a recent case on Ohio *Teafft v. Hewett, et al.*, 1 Ohio N. S. 5-11,

where the subject was examined at great length, and with ability, it was held that the machinery in a woolen factory, connected with the motive power of the steam engine by bands and straps, and only attached to the building by cleats or other means to confine it to its proper place for use, and could be removed without injury, was but chattel property. The case of *Gale v. Ward*, 14 Mass. 352, in its facts is much like the case of *Tobias v. Francis*, in our own reports. In that case Parker C. J., says, though in some sense attached to the freehold, yet they (the machines) could easily be disconnected, and used in buildings erected for similar purposes.

Upon the subject of fixtures, in the English law, the case of *Elwes v. Mawe*, 3 East, 38, and reprinted in *Smith's Leading Cases*, may well be considered the leading case. In that case, and the notes to it by Mr. Smith, and the American editor, most of the law on that subject is collected.

In a case decided in the Court of Exchequer, in 1851, *Hellawell v. Eastwood*, 6 Welsby, Hurlstone & Gordon, 295, it was held that machinery consisting of certain cotton spinning-machines, some of which were fixed by screws to the wooden floor, and some of which were fixed by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, were still personal property. B. Park said the only question was, whether the machines, then fixed, were a parcel of the freehold, and this was a question of fact depending on the circumstances of each case, and principally on the two considerations, first, the mode of annexation to the soil or fabric of the house, and the extent to which it was united to them, whether it could be easily removed without injury to itself or the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

He added, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal, without the least injury to the fabric of the building, or to themselves; and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use, as chattels. In that case, it is true, the question arose between landlord and tenant, and in such a case, it is said in the English law, the greatest indulgence is shown to the tenant, where the annexations are made for the purposes of trade or manufactures. No doubt in England, in relation to fixtures, different rules have been held to prevail; and between heir and executor, a strict rule has been adopted and the same rule seems to have prevailed between

vendor and vendee, and between mortgagor and mortgagee; and the English cases show that there is no relaxation of the rule, as applied in these latter cases, even between landlord and tenant, where the erections are made solely for the purposes of agriculture, although beneficial and important in improving the occupancy of the estate. We apprehend that much of the confusion in the authorities upon the subject of fixtures, may have had its origin in the fact that different rules have been attempted to be applied to different relations, and these different relations have sometimes been lost sight of.

We think the rule in this State should be that the various articles of machinery belonging to a manufactory are, in no respect real estate, excepting as they are part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose, and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold, or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. In the construction of a building, many things, which in themselves are chattels, as doors, window-blinds, shutters, etc., become a part of the building, and, in such cases, the manner of annexation is of no particular importance. But to make the test, whether fixture or no fixture, to be found in the relation which the chattel bears to the use of the freehold, is, to us, unwise, and against well-considered cases. The rule requiring actual annexation is not affected by those cases where a constructive annexation has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture.

In determining the character of what the plaintiff claims to be fixtures, or a part of the realty, we must not only have reference to the manner and extent of the annexation, but also to the object and purpose of it. Whether the articles in question were personal property, or fixtures, should be determinable, and plainly appear, from an inspection of the property itself, taking into consideration their nature, the mode and extent of their annexation, and their purpose and object, from which the intention would be indicated.

To change the nature and legal qualities of a chattel into a fixture, requires a positive act on the part of the person making the annexation, and his intention so to do should positively appear, and, if this be left in doubt, the article should be held still to be personal property.

We see no reason why the case of the potash kettles, in 5 Vt. should not govern this, as to the iron boiler. It was set in a brickwork, resting upon a stone foundation placed upon the ground, and the floor of the building was simply laid up to it, and it was in no other way attached to the building. So in *Hunt v. Mulanphy*, 1 Missouri, 508, a kettle and boilers put up in a tannery, with brick and mortar, was held not to be a fixture. See, also, *Reynolds, v. Shuler*, 5 Cowen, 323, and *Raymond v. White*, 7 Cowen, 319, which was the case of a heater used for applying heat to tanners' bark, in vats and leaches.

We think the four engines, used for grinding rags into pulp, cannot be regarded as a part of the paper-mill, or as annexed to it, so as to become a part of the realty. These were fixed in large oval tubs, in the usual way, the tubs standing on timbers, and the floor of the building scribed up to them, and the engines were carried and operated by means of a band connecting them with the iron shafting from which was communicated to the engines their motive power. There can be no ground to claim that the tubs in which they stood were a part of the realty, and the band was used to give the engines motion, and not for fastening them to the freehold. It could be slipped off, and put on, to give them motion, or arrest it, at the will of the operator, and they could be removed without injury to the building, or the engines. The case of *Winslow v. Merchants' Insurance Company*, 4 Met. 306, where it was held that a steam engine and boilers, and the machines for working iron, upon which they operated, were fixtures, and a part of the realty, is expressly put, so far as relates to the machines for working iron, upon the manner in which they were fitted and adapted to the mill. The words "fitted and adapted to the mill" seem to imply something more than being set down upon the floor, and fastened for convenient use but rather a peculiar adaptation and fitting to that particular location and mill. The building was a machine shop, and the steam engine furnished the motive power which moved the whole machinery in the several stories of the building, by means of connecting bands or otherwise. In regard to the case of *Gale v. Ward*, 14 Mass., C. J. Shaw, in 4 Metcalf, observed, "we do not think that an authority opposed to this opinion, because it is manifest that the Court, in that case, regarded the carding machines, though ponderous and bulky, as essentially personal property, which might have been attached and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner, in his own mill, for his own use." Besides, so far as the steam engine was concerned, it may be said of the case in 4 Metcalf, it furnished the motive power for the whole building, and may be regarded as an appurtenant to the machine shop, as much so as the water of a grist-mill,

or a paper-mill. The paper presses were kept in their places by means of cleats at the top, nailed to the floor, and at the bottom by iron screws, and by taking off the iron nuts they could be removed without injuring or disturbing the building.

In regard to the iron frame in which the calender rolls stood, it seems that was simply kept in place by means of screws at the toes of the frame, connecting it with timbers upon which it stood, and the timbers made fast to the floor by means of spikes. This could be easily removed by unscrewing the toes of the frame. The rag-cutter stood in a wooden frame, standing on the floor, and was not otherwise confined.

The trimming press was set also in a frame, and this only screwed to the floor.

The machine for making paper was kept in place by means of cleats around it, nailed to the floor, and not otherwise fastened to the building. If we regard the iron boiler as personal property, most clearly the iron pipes connected with it only by screws and bolts, which the case says could be easily taken off, should be regarded in the same light.

The iron shafting put up in the building for the purpose of turning and putting in motion the machinery, by means of hangers of iron bolted to the beams and sills of the building, we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the motive power to the machinery, and should be regarded as part of the mill, as much as a water-wheel, by which a water-power is called into existence.

Though the paper-mill was placed upon the premises subsequent to the execution of the mortgage, yet it would inure to the benefit of the mortgagee, and also carry with it all that can be regarded as incident to, or a component part of the mill, but the machinery and articles which the mortgagors placed in the building, to be used by them in their business as manufacturers of paper, and not permanently attached to the building or freehold in such a manner that they could not well be removed without material injury to the chattel or freehold, did not lose their personal identity as chattels and become a part of the realty. This, we think has long been the views of our Courts upon this subject.

The result will be that, so far as the irons in question either constituted the whole, or were a part of the machinery, of such a description and character, they remained the personal property of the mortgagors, after the fire, the same as the machinery was before the fire, and the plaintiff's right of recovery should have been limited at least to the value of the iron which was used in construction of the building, such as nails, spikes, etc., and the iron shafting used for the purpose of putting and keeping the machinery in motion, and such iron, if any, as was per-

manently fixed or fastened to the building so as to be annexed to and become a part of the realty, according to the foregoing views.

Whether it was of any importance that the plaintiff should have taken the actual possession of these irons, after the fire, so as to perfect and keep good his title, as against the creditors of the mortgagors is a point not made in the case, and one which we have not considered, and much less decided.

Judgment reversed and cause remanded.

INSURANCE

REMOVING THE PROPERTY FROM THE BUILDING IN WHICH IT IS INSURED WILL AVOID THE POLICY AS TO SUCH PROPERTY

BRADBURY V. FIRE INSURANCE ASSOCIATION

80 Me. 396 (1888)

LIBBEY, J. These actions are on fire policies, and being substantially alike were tried together and come to this court in one report. The first four policies insure a certain sum on the plaintiff's "frame stable building, occupied by assured as a hack, livery and boarding stable, situated on the north side of Court street, Auburn, Maine," and "five hundred dollars on his carriages, sleighs, hacks, hearses, harnesses, blankets, robes and whips contained therein." The fifth does not insure the building, but insures fifteen hundred dollars on the same kinds of personal property "stored in the private frame stable occupied by assured and situated near east side of Main street, Auburn, Maine." The loss claimed by the plaintiff is for damages by fire to a hack not in his stable named in the policies at the time of the damage, but in a repair shop of one Litchfield, on another street about one-eighth of a mile distant, where it had been removed the day before the fire without the knowledge or consent of the defendant, and it is admitted that the board rate for insurance on Litchfield's repair shop and contents was one per cent. more than on the plaintiff's stable on Court street. The damage to the hack by fire while at Litchfield's shop is admitted, and no question is made as to the sufficiency of the notices. The only contention between the parties is, whether the insurance attached to and followed the plaintiff's carriages, hacks, etc., when removed from his stable to another place for repairs or some other temporary purpose, or was limited to such carriages only as were at or in the stable named at time of loss or damage.

Upon this question there appears some conflict among the authorities. The general rule stated by text writers and held by the general current of decided cases is, that place where the personal property insured is kept is of the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described. Wood on Ins., p. 110; Blodgett on Fire

Ins., p. 22; Eddy Street Iron Foundry v. The Hampden S. & M. F. Ins. Co., 1 Cliff. 300; Annapolis & Eldridge R. R. Co. v. Baltimore Ins. Co., 32 Md. 506; Fitchburg R. R. Co. v. Charleston M. F. Ins. Co., 7 Gray 64. The following cases are cited as establishing an exception to the general rule and as sustaining the plaintiff's contention. Everett v. Continental Ins. Co., 21 Minn. 76; Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229; McClure v. Girard Ins. Co., 43 Iowa, 349; Longueville v. Western Ins. Co., 51 Iowa, 553; Lyons v. Providence Washington Ins. Co., 13 R. I. 347. We think a careful examination of all these cases will show that the chattels insured are so described in the policy that they can be identified without reference to the building or places where they were kept, and the court held that the words "contained in" a certain building, or kept in a certain building or place, was a part only of the description of the chattel, and if from its nature, character or ordinary use, the parties must have understood that it was to be out of the building or place a part of the time in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties in a contract, when, ordinarily, it does not bear such meaning. But this case does not appear to us to be within the authority of those cases.

The policies in suit do not insure a particular carriage or hack by any description by which it can be identified without reference to the stable. They do not insure all the plaintiff's carriages, hacks, etc., used in his livery business, contained in the stable described. It cannot be held that they cover only such carriages, hacks, etc., as were contained in the building named at the date of the policies. From the nature of the plaintiff's business, it must have been in the contemplation of the parties that the chattels named might be changed from time to time during the year, some sold, some worn out, some destroyed by accident, and others put in to take their places. The policies are similar to an insurance of a shop-keeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road, constantly changing. In such case the property insured can be ascertained only from the place of business named. Lyons v. Providence Washington Ins. Co., 13 R. I. 347, Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co., 1 Cliff. 300; Ring v. Phoenix Assurance Co., Mass. N. E. R. V. 5, No. 14, P. 387. The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss. We can see no other way of identifying the property covered by the policies. It cannot be that the policies should be so construed that they will cover a hack once put into the stable and then taken out, wherever it may be. The language of the contract is not apt to embrace such a risk. The risk might thus be

increased two or three-fold, and still if the contract must be construed as covering it, it is not a forfeiture of the policy for an increase of the risk. It is simply the risk contemplated by the parties. *Fitchburg R. R. Co. v. Charleston M. F. Ins. Co.*, 7 Gray, p. 66. The view we take of the first four policies makes it unnecessary to consider whether the terms of the fifth policy should receive a construction more strongly against the plaintiff. They are certainly no more favorable to him.

The actions are not sustained.

Judgment for the defendants in each action.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

WHAT CONSTITUTES AN "INSURABLE INTEREST"

BEVIN V. CONNECTICUT MUTUAL LIFE INS. CO.

23 Conn. 244 (1854)

This was an action of assumpsit upon a policy of insurance in favor of the plaintiff on the life of George Barstow, for \$1000. The plaintiff had paid, for four annual premiums and certain permits, \$192.80. Before procuring the policy, the plaintiff had paid to Barstow \$350 as consideration for an agreement that Barstow should go to California, engage in mining for gold, and divide equally with the plaintiff the proceeds, less expenses, until Barstow should return home, which should be at least one year. After the issue of the policy, the plaintiff advanced to Barstow personal property to the amount of \$19. Barstow proceeded to California, for three years and upwards engaged in mining, in accordance with the agreement, and then died.

There were questions in the case as to Barstow's proceeding to California by a prohibited route, and as to waiver.

The court made a finding of facts and reserved, for the advice of this court, the question what judgment ought to be rendered.

ELLSWORTH, J. Several questions of some practical importance are presented for our decision in this case. We have occasion to decide only some of them, in order to make an end of this case, and shall, therefore, allude to such only with particularity.

It is said, first, that the plaintiff had no interest in the life of Barstow, when the policy was obtained, and if any, not the \$1000 stated in the policy. In marine and fire insurance the questions and rules for ascertaining interest are, in general, well settled and of every-day occurrence. In them the rule is that the contract of insurance is one of indemnity only, recognizing policies being held to be illegal and void. The same is

true, we suppose, in insurance on lives. In England the statutes of George II. and George III. declare all policies of insurance without interest to be null and void, and although the phraseology of the statute of George III. has given rise to distinctions there, in this country we hold the English statutes to be in affirmance of the principle of the common law, that policies of insurance are contracts of indemnity only.

Without deciding what is an insurable interest in the life of another, in every case—whether it must be one of a pecuniary value, or property, which the law recognizes as property, or may be something less or different, as the interest in one's relative, or in the life of another person—in this case we have no doubt there was an insurable interest, and one which the parties could well value, to the extent it was valued in the policy. The plaintiff had advanced to Barstow the sum of \$300, besides articles of personal property, to enable him to go to California and there labor, for at least one year, and to account to the plaintiff for one half of his gains in that business. He was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. All the books hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy. If otherwise, and the question of interest is open for proof on the trial, to be determined by the estimate which jurors may put upon the value of Barstow's life, under the circumstances, the policy may afford an inadequate and precarious security. Who can tell what the plaintiff would have gained if Barstow had lived and labored under his contract in California? The plaintiff declared in the policy that he had an interest in the life of Barstow of \$1000; the defendants received this declaration as true, and made it the basis of the insurance and of their premium; now, without deciding that such declaration is, in all cases, conclusive, as to the interest or damage, we hold that in cases like the present, where there is not a definite and specific interest, and much is to depend upon the character and continuance of the enterprise, such declaration, if honestly made, is the agreed value of interest. The defendants knew what was claimed to be the interest of the insured; what the damages were estimated to be in case of death, and what amount the plaintiff wanted to secure, and the defendants agreed to this sum. It would be against good faith and against

the meaning of the parties for the defendants now to refuse to pay as they agreed. In marine insurance policies on profits always are, and must be of necessity, valued. *Mumford v. Hallet*, 1 Johns. 433.

In *Lord v. Dall*, 12 Mass. 115, a sister obtained an insurance on her brother's life, about going to sea, on whose generosity and assistance she was dependent for support. She recovered the whole sum; no question seems to have been made as to the amount, but only whether it was an interest which the law would recognize. So, in every case where a person, on his own account, insures the life of a relative, if the sum named in the policy is uncertain, would lead us to hold that a policy like this is a valued policy, as most consistent with the understanding of the parties and the principles of law. 2 Phil. Ev. 52; *Bury on Ins.* 24; 3 Kent's Com. 219; *Ang. Life Ins.* 321; 12 Mass. 118. . . .

We advise judgment for the plaintiff.

In this opinion the other judges concurred.

Judgment for the plaintiff.

A SISTER HAS AN INSURABLE INTEREST IN THE LIFE OF HER BROTHER. "WHERE A COMPANY ACCEPTS A QUALIFIED ANSWER IN THE APPLICATION, IT CAN NOT AVOID PAYING THE POLICY ON THE GROUND OF MISREPRESENTATION."

AETNA LIFE INS. CO., PLAINTIFF IN ERROR, v. FRANCE

94 U. S. 561 (1876)

Error in the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Justice Bradley delivered the opinion of the court.

This action was brought by David France and Lucetta P., his wife, to recover the amount of a policy of insurance for \$10,000, issued by the Aetna Life Insurance Company on the life of Andrew J. Chew, of Philadelphia, dated September 13, 1865, and payable to the said Lucetta, who was Chew's sister.

The policy amongst other things, contained the following stipulation:

"And it is also understood and agreed to be true intent and meaning hereof, that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing date the thirteenth day of September, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The trial resulted in a verdict and judgment for the plaintiffs. The defendant sued out this writ of error.

Numerous exceptions were taken, on which errors are assigned here; but they are all reducible to two heads, or grounds of defence, viz.: 1. Want of insurable interest in Lucetta P. France; 2. Misrepresentation and breach of warranty as to the age and health of said Chew. It is insisted that the rulings and charge of the court below on these points were erroneous. . . .

The other exceptions relate to alleged misrepresentations by Chew in the proposal for insurance. The policy makes the proposal and the answers to the questions therein a part of the contract, and declares that if they shall be found in any respect false or fraudulent, the policy itself shall be void. Among the questions are the following, with the answers given to each respectively:—

“4. Place and date of birth of the party whose life is to be insured? Ans. ‘Born in New Jersey, in 1835.’

“5. Age and next birthday? Ans. ‘Thirty years, October 28, as near as I can recollect.’

“11. Has the party ever had any of the following diseases; if so, how long and to what extent: palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs rupture, convulsions, etc.? Ans. ‘None.’

“12. Is the party subject to habitual cough, dyspepsia, etc.? Ans. ‘No.’

“13. Has the party had, during the last seven years, any severe disease? If so, state the particulars and the name of the attending physician.’ Ans. ‘No.’”

The answers were followed by this qualification: “The above is as near correct as I remember.”

The defendant offered evidence tending to show that Chew, at the time of the application, would have been thirty-five or thirty-seven years old at his next birthday, instead of thirty, and that he was born October 28, 1828; and that he had been ruptured from infancy, and so continued up to the date of the application, and wore a truss; and that he had had consumption or some disease of the lungs; and that he was subject to habitual cough and dyspepsia; and had been attended by physicians for severe disease within seven years; and that he knew all of these matters at the time of the application. Counter evidence was given on the part of the plaintiff. Among the proofs of death was an affidavit of the widow of Chew, stating that he was born October 28, 1828, which defendant relied on as to the point of age. Mrs. France denied all knowledge of the papers received by defendant as proof of loss, except her

own affidavit; and as to the alleged rupture, called amongst others, Dr. Lewis, as an expert, and proposed to him the question, whether the existence of a reducible rupture in a subject of life assurance, in his opinion, appreciably increased the risk of the underwriters? The question was objected to, but allowed.

The defendant asked the court to charge, that if any of the answers were untrue, in whole or in part, the verdict must be for the defendant. The court charged that the truth or falsehood of the answers materially affected the risk, but added:—

“But the answers here are qualified by the words appended at the foot of the application. ‘The above is as near correct as I remember,’ which are applicable to all the statements made by the assured. He must be understood, therefore, as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of his answers would avoid the policy, irrespective of his motive, because he warranted their truth; with it, the plaintiffs’ right to recover will not be defeated, unless it appears that some one of the answers were consciously incorrect.

“To avoid the policy, then, the jury must be satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness.”

And, in particular, as to Chew’s representation of his age, the court charged, “that if he knew, or had reason to believe, that the year of his birth, as stated in the answer, did not correctly indicate his age, the policy is void, and the plaintiffs are not entitled to recover.”

We think the qualification made by the court was entirely justified by the form in which the answers were given. If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application. Having accepted it, they were bound by it.

As to the diseases inquired about, the court charged substantially to the same effect, namely, that the answers called for were material, and if untrue, and Chew knew or had reason to believe them so, the policy was void. As to the alleged rupture, in particular, the court said:—

“If, however, it appears that the rupture had been completely reduced, so that its effects had entirely passed away, and it had ceased to affect his health or impair his capacity to take fatiguing and prolonged exercise, the jury will determine whether the answer is untrue as nearly as he could remember. On the other hand, if the rupture had not been cured, it is hardly presumable that he could have forgotten it at the time of the application; and if the jury so find, it was his duty to disclose the fact that he had been afflicted with this disease, and his negative answer will avoid the policy.”

And so of the rest. We think the charge was a fair one, and gave the defendant the full benefit of any falsity contained in the answers given by the applicant. Under the charge as given, we do not see how the evidence of the physician, even if irrelevant, could injure the defendant.

Other points were raised, but it is unnecessary to discuss them. From a careful examination of the whole case, as presented, we are satisfied that there is no error in the record.

Judgment affirmed.

WHERE A WOMAN IS ENGAGED TO A MAN, SHE HAS AN
INSURABLE INTEREST IN HIS LIFE

CHISHOLM, RESPONDENT, v. NATIONAL CAPITOL LIFE
INS. CO., APPELLANT

52 Mo. 213 (1873)

Appeal from St. Louis Circuit Court.

WAGNER, J. The main error assigned and relied upon for the reversal of this case is the action of the court in refusing to declare that the plaintiff had no such insurable interest in the life of the person insured as would entitle her to recover.

The record shows that there was a contract of marriage existing between plaintiff and Robert Peel Clark, and that on the 17th day of July, 1869, the defendant made and delivered to plaintiff its policy of insurance whereby it insured the life of the said Clark for the term of his natural life, for the sum of \$5000. The policy was issued and delivered to plaintiff and made payable to her as the intended wife of Clark, she paying the annual premium of \$90.20. The first premium was duly paid by her, and on the 12th day of January 1870, whilst the policy was in full force, but before the contemplated marriage had been solemnized, Clark died.

What interest or whether any is necessary in the life of the person insured to support the contract of insurance is left in some confusion by the adjudged cases, as the authorities are contradictory.

In this State we have no statute on the subject covering the case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy.

The insurance was not a mere wagering contract, and therefore cannot be said to contravene any principle of public policy. The plaintiff

had an interest in the life of Clark; a valid contract of marriage was subsisting between them. Had he lived, and violated the contract, she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defence in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretence that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement, and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.

The judgment should be affirmed.

A CREDITOR HAS AN INSURABLE INTEREST IN THE LIFE OF THE DEBTOR

ANDERSON V. ERIE

Nisi Prius, King's Bench, 1795. 2 Park Ins. (8th ed.) 914

In an action on a policy of insurance on the life of Lord Newhaven from the 1st December 1792, to the 1st of December, 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 Geo. 3, c. 48. It appeared in evidence that Lord Newhaven was indebted to the plaintiff and a Mr. Mitchell in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell alone.

Lord Kenyon was of opinion that this debt was a sufficient interest, and said that it was singular that this question had never been directly decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security.

Verdict for the plaintiff.

RIGHT OF A STOCKHOLDER TO INSURE THE PROPERTY
OF THE CORPORATION

RIGGS V. THE COMMERCIAL MUTUAL INSURANCE CO.

125 New York 7 (1883)

One Tobias was owner of thirty-six shares of stock in a steamship corporation. This corporation was the owner and operator of a steamer, "Falcon." Tobias applied to the insurance company for insurance in his own name upon this steamer. The policy was issued to him in accordance with this request. Thereafter, the vessel was destroyed by fire. The policy was assigned to Riggs, who brings this action.

The company contended that Riggs could not recover, because Tobias had no insurable interest in the steamer when the policy was issued to him.

Mr. Justice Andrews said: "The stockholder in a corporation has no legal title to the corporate assets in property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner and can deal with corporate property as owner, subject only to the restrictions of the charter. But stockholders in a corporation have equitable rights of pecuniary nature growing out of their situation as stockholders which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits, through the exercise of the (divisio) corporate franchises, and gains so made are distributable among the stockholders, according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders; also at the settlement of the affairs of the corporation, the assets, after payment of the debts, are divisible among the stockholders. Therefore the right to dividends and the right to share in the fiscal distribution of the corporate property may be prejudiced by its destruction."

Judgment was given for plaintiff.

WHERE PLAINTIFF MISREPRESENTS THE FACT THAT HE
HAS BEEN DENIED INSURANCE BY OTHER COMPANIES,
THE COMPANY HAS THE RIGHT TO HAVE THE POLICY
CANCELLED ON RETURNING THE PREMIUM

LONDON ASSURANCE V. MANSEL

11 Chancery Division, 363 (1879)

This was an action by the plaintiffs, who were duly incorporated by the name of "The London Assurance," and were empowered to grant

assurances on lives, to set aside an agreement to grant a policy of life insurance to the defendant.

On the 16th of August, 1878, the plaintiffs, on the application of the defendant's solicitor, sent him forms of proposals for life assurance, and on the 20th of August, 1878, the defendant left with the plaintiffs at their office a proposal for assurance on his life for £10,000 filled up on one of the plaintiff's forms of proposal, and signed by the defendant. The questions and answers contained in this proposal, so far as material were as follows:—

Questions.

"Are you now and have you always been of temperate habits?"

"State if there be any other material circumstance affecting your past or present state of health or habits of life to which the foregoing questions do not extend?"

"Has a proposal ever been made on your life at any other office or offices? If so, where?"

"Was it accepted at the ordinary premium, or at an increased premium or declined?"

Answers.

"Yes"

"Not to my knowledge."

"Insured now in two offices for £16,000 at ordinary rates. Policies effected last year."

At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

On the same day the defendant had an interview with the medical officer of the plaintiffs, and in reply to his inquiries gave substantially the same answers as those in the proposal before stated.

The plaintiffs being, as they alleged, satisfied with and relying upon the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the defendant to whom he had referred them, sent to the defendant's solicitor a written acceptance of the proposal for an assurance of £10,000 on the defendant's life, and, on the 23rd of August, 1878, received from him a check for the first year's premium, and on the 24th of August, 1878, the plaintiffs sent him the usual certificate as to the assurance being effected.

The plaintiffs alleged that shortly after the last-mentioned date, they discovered that, though the defendant's life had been assured for £10,000 in the Rock Life Assurance Company, and also for £6,000 in

the Equity and Law Life Assurance Society, the last-named assurance society had in November, 1877, when the defendant applied for a further assurance of £3,000, decided not to increase the amount at risk on his life; also that the defendant had shortly afterwards made proposals to the Scottish Equitable Society and to the Crown Insurance Society, who had respectively declined his proposals, to the North British and Mercantile Insurance Society, which proposal was withdrawn, and to the Liverpool, London, and Globe Company, by whom the proposal was not accepted; that in June, 1878, the English and Scottish Law Life Assurance Association, after accepting a proposal for an assurance of £5,000 on the life of the defendant, had refused to proceed with it on learning that the Equity and Law Life Society had declined the further assurance of the defendant's life; also, that in August, 1878, the defendant had applied for assurances on his life to the Clerical, Medical, and General Life Assurance Society, to the Scottish Amicable Assurance Society, and the Law Life Assurance Society, but that each of the said offices had declined his proposals.

The plaintiffs alleged that they thereupon determined not to proceed with the assurance, and that their solicitors wrote to the defendant's solicitor to that effect and sent a check for the amount of the premium, which was returned by the defendant.

The plaintiffs then brought their action, setting out in their statement of claim the facts before stated, and alleging that it was the duty of the defendant to have informed them that his life had been refused by the said several offices; that such fact was a very material fact in a contract of life assurance, and that the plaintiffs would not have entertained the defendant's proposal for assurance had he informed them that his life had been refused by other offices, which the defendant had concealed.

The plaintiffs claimed a declaration that the acceptance by the plaintiffs of the defendant's proposal for assurance on his life for £10,000, and the contract by the plaintiffs for the assurance on the life of the defendant, were void.

JESSEL, M. R. The action in this case is to set aside an agreement for assurance for life on the ground of concealment of a material fact in effecting the assurance.

The first question to be decided is, what is the principle on which the court acts in setting aside contracts of assurance? As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases and though there may be certain circum-

stances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather in my opinion, an illustration of the application of the principle than a distinction in principle.

Now I come to the facts of the case, which certainly appear to me to be very plain and clear indeed. The office of the London Assurance asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" and there is an agreement at the end, "That this proposal and declaration shall be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. The question was, "Has a proposal been made at any office or offices, if so, where?" He does not state "I proposed to half a dozen offices," which was the truth, but simply says, "Insured now in two offices," which of course must have been intended to represent an answer, and therefore would mislead the persons receiving it who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry, but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer, and the assured is not to be allowed to say, "I did not answer the question." But if it were so, it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact. I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality,—a fact upon which the offices place a great reliance. They always want to know what other offices have done with respect to the lives. But in this case there could be no question as to its materiality. In the first place, we have this in the answer: "The defendant admits that proposals were made to the Clerical, Medical, and General Life Assurance Society, the Scottish Amicable Life Assurance Society for an assurance on his life, and such proposals were declined." There are three

proposals as admitted by the answer declined in the very words of the question; and then he goes on (His Lordship then stated paragraph 15 of the answer, and added): We have an admission by the defendant that no less than five insurance offices had declined to accept his life.

Now, to suppose that any one who knows anything about life insurance, that any decent special jurymen could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurance offices? is, I say, quite out of the question. There can be but one answer—that a man is bound to say, “My proposals have been declined by five other offices. I will give you the reasons, and show you that it does not affect my life,” as he admits it to be by this answer; but of that the office could judge. There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. But in fact I have elements here admitted on the pleadings for deciding that question irrespective of the ordinary knowledge of the practice of mankind in respect to these matters which is to be imputed to a good special jurymen, because I have here two things admitted, first of all, that the proposal which forms the basis of the contract asks a question, Has a proposal been declined?

Now, where it is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of *Anderson v. Fitzgerald*, 4 H. L. C. 484, where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact.

Further, we have this, that within the defendant's own knowledge the English and Scottish Law Life Assurance Society having accepted his life, which had been duly passed by their medical officer as a first-class life after examination, and merely reserving a right to decline when they found that one other office, not five, but one, had declined the life, or rather the proposal, at once withdrew from their acceptance and declined his proposal. So that the defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

It seems to me a very plain and clear case, and that the plaintiffs are consequently entitled to judgment.

The order will be—The plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.

A SUBSTANTIAL COMPLIANCE WITH THE TERMS OF A
WARRANTY IS SUFFICIENT

AURORA FIRE INS. CO. V. EDDY

49 Ill. 106 (1868)

Appeal from the Circuit Court of De Kalb County; the Hon. Theodore D. Murphy, Judge, presiding. Mr. Chief Justice Breese delivered the opinion of the court:

This was an action of assumpsit, on a policy of insurance of four thousand dollars on a three-story flax factory, brought by James W. Eddy against the Aurora Fire Insurance Company, and which resulted in a verdict and judgment for the plaintiff for three thousand five hundred dollars.

To reverse this judgment the defendants have appealed to this court, and several points are made, but one of which we deem important to notice.

The policy contains this clause: "It is expressly agreed, that the assured is to keep eight buckets filled with water on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire; also, that smoking shall be strictly prohibited in or about the building."

The application for insurance contained a like agreement.

There was proof that some buckets were in the building, and that sometimes all of them would be above, and sometimes all below.

The court, on behalf of the plaintiff instructed the jury that insurance policies were to be liberally construed in favor of the assured, and strictly construed against the underwriters, and that a substantial compliance with the stipulations of the policy was all that was required on the part of the assured, and if the jury believes, from the evidence, that the plaintiff substantially complied with the stipulation concerning keeping the buckets of water in the building assured, contained in the policy in this case, then that was all that was required of the assured under the stipulation, and on that point the law was with the plaintiff.

This instruction, and one refused for defendants on the same subject is the part of the case we have considered.

As to the first branch of plaintiff's instruction, we have always understood that the rules by which a policy of insurance is to be construed and the principles by which it is to be governed, do not differ from other mercantile contracts, but conditions and provisions in such policies are to be construed strictly against the underwriters, for the reason that they intend to narrow the range and limit of the force of the principal obli-

gation; but this was not a condition or proviso in the policy but an express agreement of the assured, to be construed by the same rules by which other agreements are construed. But if the underwriters have left their design or object doubtful by the use of obscure language, the construction ought to be, and will be, most unfavorable to them, but nothing of that kind is apparent here. It was an express agreement of the nature of a promissory warranty that the assured would have the number of buckets specified always filled with water and disposed upon the floors as therein stated.

Appellee has referred to some cases in which a stipulation in a policy that a watchman was kept on the premises does not require that a watchman be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises. *Houghton v. Manf. Ins. Co.*, 8 Metcalf, 122, and *Crooker v. People's Mutual Ins. Co.*, 8 Cush. 69. These cases go to the extent claimed. Those cases and *Hovey v. Amer. Mutual Ins. Co.*, 2 Duer, 554, proceed upon the ground that the spirit of the warranty was that there should be a competent night watch kept on the insured premises, and one who might be confided in for the faithful performance of such duty.

Other respectable courts have not gone quite to the extent of those cases on this point. In the case of *Glendale Woolen Co. v. The Protection Ins. Co.*, 21 Conn. 19, it was held, where one condition of the policy was there should be a watchman nights, that was a warranty by the assured, that they would keep a watchman in the mill through the hours of every night in the week, and the watchman having been absent on Sunday morning early, when the fire occurred, there could be no recovery on the policy. The court said, where there is no imperfection or ambiguity in the language of a contract, it will be considered as expressing the entire and exact meaning of the parties, and no evidence of extrinsic matters or usages will be received to vary the terms expressed. The case of *Sheldon & Co. v. The Hartford Fire Ins. Co.*, 22 ib. 235, is to the same effect.

In the review of the cases on this subject which time has enabled us to make, we have thought here was a just mean between the extremes of the different cases examined, which, when found, would establish a satisfactory rule.

Whilst this is an express agreement of these parties, and giving force and effect to the well-recognized rules for construing agreements, in which the intention of the parties is an important element, we think the court, in construing it, by the fourth instruction complained of, misled the jury.

It could not have been in the reasonable contemplation of either of

these parties, that in a cold mill, where fires were not allowed in the winter season, buckets of water should be on hand at all times, for this might have been an impossibility; nor could it have been understood that the buckets should be covered up and hid from ready access by piles of flax, or stowed in an out-of-the-way place.

We think, therefore, that the jury should have been told, that, whilst from freezing, or other unavoidable causes, a literal compliance with the warranty might have been impossible, and could not have been in the contemplation of the parties, still it was incumbent on the assured to show that the required number of buckets, in good and serviceable condition, was at the places designated in the agreement ready for instant use. What was a substantial compliance was a mixed question. By the instruction we think the court should have given, as above, the attention of the jury would be fixed upon certain facts necessary to be proved, which when proved, would hold the underwriters and show a compliance with the agreement in its spirit and intent. As given, the instruction must have misled the jury,—it gave them too wide a discretion,—and was erroneous, and this error must reverse the judgment. *Taylor v. Beck*, 13 Ill. 386. These remarks render any notice of the defendants' instructions on the same subject unnecessary at this time.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLS

NUNCUPATIVE WILLS

GODFREY V. SMITH ET AL.

73 Neb. 756, 103 N. W. 450 (1905)

OLDHAM, C. Charles A. Smith, who, for about 18 years prior to his death, resided in, and at the time of his death was a resident of, Kearney county, Neb., departed this life March 4, 1903, in the city of Minden, leaving as his sole and only heirs his widow, Lillie A. Smith, and his daughter, Alta Smith, a minor of the age of seven years, and leaving an estate consisting of real estate of the value of \$12,000 and personal property of the value of \$1,000. Within six days after the death of Charles A. Smith, his widow, Lillie A. Smith, had reduced to writing a paper purporting to be the nuncupative will of Charles A. Smith. . . .

Section 4993, Cobbe's Ann. St. 1903, provides as follows:

"No nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of one hundred and fifty dollars, that is not proved by the oath of three witnesses, at least, that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; nor unless such nuncupative will was made at the time of the last sickness of the deceased, and in the place of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will, except when such person was unexpectedly taken sick, being from home, and died before he or she had returned to the place of his or her habitation."

It will be noted that this provision of the statute requires that the will be proved by the oath of at least three witnesses who were present at the making thereof, and that it be proved that the testator at the time did bid the persons present, or some of them, to bear witness that such was his will, or to that effect. Under this provision of the statute it must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended that the words then uttered, and no others, should constitute his will. If he only gives instructions

for a will that he desires to have reduced to writing, but fails to execute, the instructions cannot be sustained as a nuncupative will. 1 Underhill on Wills, § 174; *In re Hedben's Estate*, 20 N. J. Eq. 473; *In re Male's Estate*, 49 N. J. Eq. 266, 24 Atl. 370; *Porter's Appeal*, 10 Pa. 254; *Reese v. Hawthorne*, 10 Grat. (Va.) 548; *Ellington v. Dillard*, 42 Ga. 361.

Now, which one of the witnesses to this will, from the evidence above set out, was called upon to bear witness in the presence of the others that the words then spoken were intended to be the last will and testament of Charles A. Smith? It certainly was not the minor defendant, Alta Smith, for practically all she remembered of the conversation was that her father intended to give her \$1,000, and let her mother have the balance. She did not remember, nor assume to remember, that he called on either Mr. Taylor or her mother to witness that any particular words were his last will, or anything to that effect. If the will offered for probate is sustained, and if it were held that real estate may be devised by nuncupative will under our statute, the effect of this disposition of the estate of the decedent would be to practically disinherit this minor defendant, so that probably she could not be properly held an incompetent witness because of interest in the proposed will. But in view of the very tender age of this witness she would be presumptively incompetent to testify as either a subscribing witness or an attesting witness to a will in the absence of proof showing sufficient understanding to comprehend something of the nature and contents of the instrument which she was called upon to attest, and no proof of this kind is in the record. Proof of the rogatio testium or formal calling of witnesses to bear witness is a necessary element in this class of wills, and, no matter how clear the testatory intent may be proven, a paper offered as such will be invalid as a nuncupative will without satisfactory proof of this requisite. *Page on Wills*, § 237; *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423; *Grossman's Estate*, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; *Wiley's Estate*, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569; *Page's Will*, 23 Wis. 69; *Porter's Appeal*, 10 Pa. 254.

While it is true that in the proof of the rogatio testium no particular form of words is required, and it is sufficient under the provisions of our statute if the testator, by words, sign, or token, indicate to one of the witnesses to bear testimony that the words then spoken are intended as the last will of the testator, yet such word, sign, token must have been intended by the testator as a request, and must have been understood as such by the witnesses present. *Weir v. Chidester*, 63 Ill. 453; *Owen's Appeal*, 37 Wis. 68; *Bradford v. Clower*, 60 Ill. App. 55. Now, if we construe the words as spoken to witness Taylor by decedent, "I want you to see that it goes that way," as a sufficient request to bear

witness to his will, proof of this request is only supported by the testimony of witness Taylor, who is disinterested, and the wife of decedent, who is the beneficiary under the will. While it is only necessary to call on one witness to bear witness, yet it must be done in the presence of the other witnesses, and such fact must be proved by their testimony.

The general rule is that a nuncupative will cannot be established by one having an interest as legatee in the will. *Beach on Wills* (Pony Series) § 10; *Gills' Will*, 2 Dana (Ky.) 447; *Haus v. Palmer*, 21 Pa. 296; *Jones v. Norton*, 10 Texas 120. Nuncupative wills, except those of soldiers and sailors in the active military or naval service of the government, have never been looked upon with favor by the courts, and proof of such wills is required in strict conformity with the statute authorizing them. *Morgan v. Stevens*, 78 Ill. 287; *Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Biddle v. Biddle*, 36 Md. 630; *Taylor's Appeal*, 47 Pa. 31; *Leachman v. Bonal*, 1 Addams, Ecclesiastical Rep. 387.

Section 4995, Cobbey's Ann. St. 1903, provides as follows:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, shall be wholly void unless there be two other subscribing witnesses to the same; but a new charge on the land of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will."

This section of the statute plainly declares the policy of preventing the proof of wills from being established by interested witnesses. While it is true that the words "subscribing witnesses," used in this section, technically construed, would only apply to a witness to a written will, and not to the attesting witness of an oral testament, yet, if this narrow construction be given the section above quoted, it destroys the effect of the use of the words "all beneficial devises, legacies and gifts whatsoever made or given in any will," for there can only be technically a subscribing witness to a written will; but if a construction be given this section in conformity with the manifest intention of the lawmakers we will treat "subscribing witness" as having been used as synonymous with "attesting witness," or a witness by whose testimony a will must be established.

We are cited by counsel for proponent to a well-written opinion from the Supreme Court of Georgia in the case of *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110, in which it was held that under the statutes of that state the words "subscribing witness" could only be held to apply to a witness to a written will. The statute construed in the case just cited is as follows: "If a subscribing witness is also a legatee or a devisee under the will, the witness is competent, but the legacy or devise is void." It will be noted that this statute does not apply to legacies and devises

under any will, and it specifically makes the witness competent to testify, but renders the legacy void. Now, in the case at bar, it would be purely paradoxical to hold that two of the attesting witnesses, who are the legatees under the will and sole heirs at law of the deceased, might be permitted to testify, but could take no legacy under the will, for the effect of such a holding as this would be to leave the decedent intestate, and to admit to probate an alleged will that would neither bequeath nor devise any property to any one. We are therefore compelled to conclude that neither of the legatees named in this will are competent witnesses to establish the will.

There is another question urged for consideration, and that is as to whether the proof is sufficient to establish the fact that the will offered for probate was made at the time of the last sickness of the deceased. The expression "last sickness" or last "last illness" occurs in nearly all American statutes providing for nuncupative wills, and is borrowed from the English statute, 29th Charles the Second, of which our own statute is a practical re-enactment. The leading American case which construed the term "last sickness" in statutes of wills was written by the learned Chancellor Kent in *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, and it was there held, by a divided court, however, that the term "last sickness" was equivalent to meaning "in extremis," or an illness or sickness so violent that the testator had not time, nor opportunity, nor means at hand, after making his oral will, to make a written will in legal form. This decision is generally commended by the text-writers, and has been followed in *Bellamy v. Peeler*, 96 Ga. 467, 23 S. E. 387; *Donald v. Unger*, 75 Miss. 294, 22 South. 803; *Reese v. Hawthorn*, 10 Grat. (Va.) 548; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371; *In re Rutt's Estate*, 200 Pa. 549, 50 Atl. 171; *O'Neill v. Smith*, 33 Md. 569. A more liberal view, however, of the meaning of this phrase has found favor in recent decisions of the Supreme Courts of Alabama, Tennessee, Illinois, and Kansas. *Johnson v. Glasscock*, 2 Ala. 218; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215; *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290; *Baird v. Baird*, 70 Kan. 564, 79 Pac. 164, 68 L. R. A. 627.

Under the decisions last cited it is held that, where a verbal will is made in the last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making

of a written will. We are inclined to think that this rule is all that a fair interpretation of the statute requires, and that a sufficient precaution to prevent imposition and fraud on the estates of decedents is taken by the courts when strict proof is required by disinterested witnesses that the words spoken were intended as the last will of the decedent, and that the witnesses present, or some of them, were called upon to bear witness of such fact. We think that the evidence was probably sufficient to sustain the verdict of the jury on the question that the will offered for probate was made in the last sickness of the deceased.

In view of the conclusion to be reached, it is not necessary to determine the question whether real estate is a subject of devise by nuncupative will under our statute. The only question involved in this controversy at the present time, and now before us for adjudication, is whether or not the will offered in the county court shall be admitted to probate as the last will and testament of the deceased, and because of the interest of one of the attesting witnesses and the incompetency of the other, as before set out, there is not sufficient competent evidence to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed, and the cause be remanded for further proceedings.

Ames and Letton, CC., concur.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

A WILL DISTINGUISHED FROM A GIFT—GIFTS CAUSA MORTIS

DREW V. HAGERTY

81 Me. 231; 17 Ail. 63 (1889)

Exceptions from supreme judicial court, Androscoggin county.

Action for money had and received, brought by Franklin M. Drew, administrator, etc., of Daniel Hagerty, deceased, against Mary Hagerty. Defendant claimed the property, which was money deposited in a savings bank, under an alleged gift causa mortis of the savings bank book made by the intestate on the day of his death. Verdict for plaintiff which defendant moved to set aside, and also excepted to the charge of the court.

WALTON, J. The most important question is whether the gift of a savings bank book from husband to wife, causa mortis, is valid without delivery, provided the book is at the time of the alleged gift already in

the possession of the wife. The action was tried before the chief justice, and he ruled that, to constitute a valid gift *causa mortis*, there must be a delivery; that, if the property "be at the time already in the possession of the donee, the donor's saying to the donee, 'You may have it,' or 'You may keep it; it shall be yours,'—does not pass the property in the case of a gift *causa mortis*."

We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with when the donee already had possession. But such is not its only purpose. It is essential, in order to distinguish a gift *causa mortis* from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliveration and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes; and it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts *causa mortis* ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury. See *Mathews v. Warner*, 4 Ves. 187, 196, note; *Leathers v. Greenacre*, 53 Mo. 561, 569. As said in *Hatch v. Atkinson*, 56 Me. 326, it is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury.

We are aware that some text-writers have assumed that, when the property is already in the possession of the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*. A gift *inter vivos* may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held in *Wing v. Merchant*, 57 Me. 383, and the jury were so instructed in this case, and the defendant had the benefit of the instruction. But the question we are now considering is not whether a gift *inter vivos* can be sustained without a distinct act

of delivery, but whether such a relaxation of the law can be allowed in the case of a gift causa mortis. We think not. Reason and the weight of authority are opposed to such a relaxation. *Hatch v. Atkinson*, 56 Me. 326; *Lane v. Lane*, 76 Me. 521; *Parcher v. Savings Inst.*, 78 Me. 470, 7 Atl. Rep. 266; *Dunbar v. Dunbar*, 80 Me. 152, 13 Atl. Rep. 578; *Miller v. Jeffress*, 4 Grat. 472; *Franch v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147; *Delmotte v. Taylor*, 1 Redf. Sur. 417; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Kenney v. Public Adm'r*, 2 Bradf. Sur. 319; 2 Kent, Comm. (10th Ed.) 602, and note; *Dickeschied v. Bank*, 28 W. Va. 340; *Walsh's Appeal*, (Pa.) 15 Atl. Rep. 470, and note.

It is the opinion of the court that the gift of a savings bank book causa mortis, to be valid, must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee, and that the delivery must be made for the express purpose of consummating the gift, and that a previous and continuing possession by the donee is not sufficient; and that in this and in all particulars the rulings in the court below were correct and that no cause exists for granting a new trial.

Motion and exceptions overruled.

Peters, C. J., and Danforth, Virgin, Emery, and Haskell, JJ., concurred.

GIFTS CAUSA MORTIS

MARSHALL V. BERRY

13 Allen, Mass. 43 (1866)

Tort in favor of the administrator of the estate of Abby L. Marshall for the conversion of three United States bonds and two United States treasury notes, of \$100 each.

At the trial in the superior court, before Morton, J., there was evidence tending to show that the intestate, who was the plaintiff's wife, died on the 17th of June, 1865, leaving no child; that she was the owner of the property mentioned in the declaration, and while on her death-bed, and then being under the immediate apprehension of death, she directed the defendant upon her decease to deliver the bonds to her brother Edward Berry as a donatio causa mortis; that at the same time she delivered to the defendant for her mother the treasury notes, and directed him upon her decease to deliver them to her mother as a donatio causa mortis. Neither the mother nor the brother was present and there was no delivery to either in the life time of Mrs. Marshall. She died soon afterwards, leaving no debts, and no other property except to the value of five hundred and fifty dollars; and the defendant claimed said

sum, as having been transferred and given to him by the intestate before her death, and had commenced a suit which is now pending to recover the same. Soon after Mrs. Marshall's death, and before the property had been delivered as directed by her, and before the plaintiff had taken out letters of administration, he notified the defendant not to deliver the bonds and treasury notes to the brother and mother respectively. The plaintiff was appointed as administrator on the 5th of July, 1865, and in the latter part of the same month demanded the bonds and notes from the defendant, but not until after the same had been delivered to the brother and mother in pursuance of the directions of the deceased; and said delivery was without the knowledge of the plaintiff.

The defendant asked the court to instruct the jury that upon this evidence the plaintiff could not maintain this suit; but the judge declined so to rule, and instructed the jury that the plaintiff was entitled to a verdict for the value of the bonds and notes. The jury returned a verdict accordingly, and the defendant alleged exceptions.

WELLS, J. The evidence tended to show a good *donatio causa mortis* of a part at least of the property claimed by the administrator. It was property which is now held to be capable of such disposition. Delivery to a third person for the intended donee, to be given to him after the decease of the donor, and actual receipt and acceptance by the donee after such decease, complete the conditions of such a gift and perfect the title in the beneficiary. *Sessions v. Moseley*, 4 Cush. 87; 1 Williams on Executors (4th Am. Ed.) 686, note. It would seem, therefore, that the ruling of the judge who tried the case, directing a verdict for the plaintiff, must have been upon the ground which has been argued by the plaintiff's counsel here, namely, that a married woman is not authorized under our statutes to make such a disposition of her separate property.

It is contended that a gift *mortis causa* is a testamentary disposition of estate, and therefore, if made by a married woman, would be contrary to the intent of Gen. St. c. 108, 9, and, if sustained, would tend to defeat that provision. Although it is of a testamentary character in some of its incidents, and is said to have been deemed by the Roman law "of the nature of legacies;" 1 Story on Eq. 607; yet inasmuch as, by our law, an actual delivery, or some equivalent act, by the donor, in his lifetime, is necessary to its validity, we think it must be regarded as, in its essential character, a gift. The title passes by the delivery, defeasible, only in the lifetime of the donor, by revocation, either express, or implied by his recovery or some other act inconsistent with the gift and indicating a purpose to resume it. The death of the donor perfects the title, by terminating his right or power of defeasance. This mode of transmission

can apply only to certain specific articles capable of passing by delivery and not as a (complete?) disposition of the donor's estate. If it purport to be such a disposition, that is, if it assume the province of a will, it is void. *Headley v. Kirby*, 18 Pa. 326. It is not subject to probate, nor to contribution with legacies in case of insufficiency of assets, nor to any of the incidents of administration. The donor at his decease is held to be already divested of his property in the subject of the gift, so that no right or title in it passes to his personal representatives. The donee takes the gift, as it is said, not from the administrator, but against him. It is subject to debts; but only in the same way as other voluntary conveyances and gifts would be. That the wife may thereby evade the provision of the statute, which disables her from depriving her husband of more than half of her personal estate by her will, without his consent in writing, may be equally urged against any disposition of it in her lifetime. This consideration does not protect the wife from such disposition of his estate by the husband. *Chase v. Redding*, 13 Gray. 418.

We see no reason for guarding the rights of the husband more tenderly than those of the wife. . . .

The verdict must therefore be set aside and a new trial granted. Exceptions sustained.

INCAPACITY FROM UNSOUND MIND

CONVERSE V. CONVERSE

21 Vt. 168 (1849)

Appeal from a decree of the probate court, allowing the will of Hamblin Converse. Trial by jury, December Term, 1848. Bennett, J., presiding.

The court, at the trial, among other things not objected to, instructed the jury that the validity of the will in question must depend upon the fact, whether the testator had sufficient mental capacity to execute it at the time it was executed; and that, to give it effect, he must then have been of sound disposing mind; but that this did not in any way imply that the powers of the mind must not have been weakened or impaired by disease or old age; and in regard to the degree of capacity, which the jury must be satisfied the testator possessed at the time of making the will, the court told the jury, that it would not be sufficient that he might be able to comprehend and understand a question which might be propounded to him, and answer it in a rational manner; nor was it necessary that he should have such a capacity of mind as would justify his engag-

ing in complex and intricate business; but that the jury must be satisfied, in order to justify them in establishing the will, that the testator, when he made it, was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property, as therein provided for, both as to the property he meant to dispose of by his will, and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them; and that, if they found all this, it should be found that he had sufficient capacity to make the will in question, but otherwise not.

The jury returned a verdict establishing the will. Exceptions.

The opinion of the court, on appeal, was delivered by

REDFIELD, J. The subject involved in this case is one of some difficulty. It is not easy to lay down any precise rule, as to what exact amount of mental capacity is sufficient to enable one to dispose of property by will. The rule laid down by the judge in this case, in summing up to the jury, seems to have been rather a medium one, rather sensible and judicious; and if we reversed the judgment, we could hardly expect to prescribe a safer or more intelligible one. Every man will have his own mode of expressing the thing. The rule of one is very little guide to another.

I have myself usually told a jury, in these cases, that less mind is ordinarily requisite to make a will than a contract of sale, understandingly, for the reason that in contracts of sale there are usually two parties, and some degree of antagonism between their interests and efforts; so that here mind is opposed to mind, and consequently it is somewhat more difficult to see clearly the just bearing of all the relations presented than under the common circumstances of making a will, where one is free to act upon his own perceptions merely. But this is not always the case in making a will. One may be beset by an army of harpies in the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale.

But it may be safe, no doubt, to affirm that, in making any contract understandingly, one must have something more than mere passive memory remaining. He must undoubtedly retain sufficient active memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. The elements of such a judgment should be the number of his children, their deserts, with reference to conduct and capacity,

as well as need, and what he had before done for them relatively to each other, and the amount and condition of his property, with some other things perhaps. The capability of men in health to form correct judgment in such matters is no doubt very unequal, and, when there is no inherent incongruity in the will itself, and no just ground to suspect improper influence, juries are, and perhaps should be, very liberal in sustaining testamentary dispositions. But there must undoubtedly be some limit. When one is confessedly in a condition to be constantly liable to commit the most ludicrous mistakes in regard to the most simple and familiar subjects, he ought not to and cannot make a will.

Judgment affirmed.

A WILL PROCURED BY UNDUE INFLUENCE WILL NOT BE
ADMITTED TO PROBATE

IN RE TYNER'S ESTATE

TYNER, ET AL. V. VARIAN, ET AL.

97 Minn. 181, 106 N. W. 898 (1906)

ELLIOTT, J. This is an appeal from a judgment of the district court, sustaining the will of John Tyner after the probate court had refused to admit it to probate.

John Tyner died testate, November 10, 1903, at the age of 87, leaving as heirs at law three sons, Richard, Thomas, and John, one daughter, Rebecca O'Leary, the children of two deceased daughters, and his wife Margaret. The will in question was executed July 2, 1891. The property consists of 160 acres of land in Dakota county, Minn., and personal property of about the value of \$4,500. Under the will Richard, Thomas, and John receive \$2.50 each. To the wife, Margaret, is given "all the rest, residue and remainder of my property, both real or personal, or mixed, of which I may die seised or possessed, to have and to hold for and during the term of her natural life, and to use as she may deem best, and I do hereby authorize my said wife to dispose of any of the personal effects and convert the same into money and to use so much as may be necessary for her personal support."

After the death of the wife, Rebecca O'Leary, the daughter, and Mary A. Bird a niece, are given \$500 each "out of my moneys and credits, if so much remains after the payment of all claims and expenses of the last sickness of myself and wife." Other small bequests were made, but they are not important as far as this appeal is concerned. After the death of Margaret Tyner, all the land owned by John Tyner is given to

Richard and William Varian, the nephews of the wife, Margaret. The result is that Margaret Tyner is given the use of the land and of all the personal property during her life, and at her death the land goes to her nephews, to the entire exclusion of the children of the testator. The contestants, the children of the testator, contend that the will is the result of undue influence exercised by Margaret Tyner, the wife of the testator.

1. The right to dispose of property by will is the creature of positive law, but it is carefully guarded and protected. A person who has testamentary capacity may make such a disposition of his property as conforms to his ideas of justice and propriety. He may be guided by lofty and beneficent motives, or by sordid prejudice and personal dislike. The justice and righteousness of his final dealings with those who are the natural objects of his bounty and toward whom he has assumed solemn duties and obligations are to be determined by the final judge of all human conduct. Subject to very limited statutory restrictions, the power of testamentary disposition is absolute.

But a valid will must be the result of the voluntary act of the testator, and not merely express the will of some other person. The wife, and other possible objects of his bounty, may properly influence his actions; but this influence must not be so great as to destroy his power of will. The words "undue influence" carry with them their own limitation. The influence must not be undue. To constitute undue influence the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy his free agency and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and the calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitutes undue influence; neither does solicitation, unless the testator is so worn out with importunities that his will gives way. *Robinson v. Robinson*, 203 Pa. 401, 53 Atl. 253.

The fact that the will is inofficious, harsh, and unjust is not in itself evidence that it was induced by undue influence. *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885. Nor is the fact that the beneficiary under the instrument had special opportunities to exert undue influence over the testator. But when there is evidence independent of any question of inequality in the will, tending to show acts of undue influence over the testator to procure the will on the part of those who appear to have been

preferred, the fact that the distribution of property is grossly unequal and unjust may be received to strengthen the evidence of undue influence. *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827; *Nelson's Will*, 39 Minn. 204, 39 N. W. 143; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *In re Hess Will* 48 Minn. 504; 51 N. W. 614; 31 Am. St. Rep. 665; *Clarity v. Davis*; 92 Minn. 60, 99 N. W. 363; *Fisher v. Sperl*, 94 Minn. 421, 103 N. W. 502; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293.

Generally the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a prima facie case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon the proponents to show that the instrument is the will of the testator. It is not very material whether we say that in such case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a prima facie case. *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; *Elliott*, Evidence, vol. 1, §92; *Thayer*, Prelim. Treatise on Evidence, P. 551. What is meant is that a point is reached when the contestant prevails unless the proponent assumes the obligations of going forward with his evidence. *In re Sperl's Estate*, supra, and cases there cited; *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407; *Doyle v. Welch*, 100 Wis. 24, 75 N. W. 400; *Disch v. Timm*, 101 Wis. 179, 77 N. W. 196; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357, note; *Clarity v. Davis* (Minn.) supra.

In the light of these general principles we proceed to a review of the evidence. It is not possible to set out all the testimony; but a very brief summary will be sufficient to show that the contestants fulfilled all the requirements necessary to make a prima facie case of undue influence, and that it was not overthrown by the evidence offered by the respondent. John Tyner's first wife died in 1866, and within two months thereafter he married Margaret Varian. When the second wife came into the family, she found four children, all under 18 years of age. Almost from the beginning the family life was unhappy. She evidently took a dislike to the children, and soon began a systematic effort to drive them from the home. In this she was ultimately successful. The children were frequently whipped by the father at her request. They were not allowed the food which was supplied to the other members of the family. They were deprived of proper and necessary clothing and schooling and seem to have been generally illtreated. One of the

boys returned home on two occasions and was refused admission by his stepmother. Another farmed the land for two years, but finally left because of trouble with Margaret. A few years later the father sent for him, and he made another attempt to run the farm, with the same result. She disliked them, and was determined that they should not be at home with their father. It clearly appears that the boys were driven from home by the continuous ill-treatment of Margaret Tyner. During the last illness of John Tyner his wife would not permit reports of his condition to be sent to his absent children, and she prevented the news of his death reaching them until it was too late for them to attend the funeral. There is no evidence that the children were to blame, and in view of the age and relation of the parties it should not be presumed. John Tyner was an illiterate man, unable to read or write. He seems to have had some natural capacity for acquiring and retaining money, which he concealed about the premises in old tomato cans. The testimony shows that Margaret was much the stronger character, and generally had her way about household and business affairs. She had some education, and her husband, as is usual in such cases, overestimated the importance of a little book learning. He was so deaf that it was necessary for her to be with him when he transacted any business and do most of the talking. He seems to have relied largely upon her for his information and trusted to her judgment. She was persistent, energetic, and resourceful. Like her husband, she was in the habit of drinking, and they frequently went to town and got drunk together.

The property and its final disposition seems to have been continually in her mind, and from the first she determined that the children should never have the land. She told the neighbors that the land had been promised to her brother's children. She kept everlastingly talking to her husband about the worthlessness of the boys, and accused them of being lazy, thieving, and shiftless. Her purpose, it may fairly be assumed was to so prejudice his mind against them that he would cast them off and leave his property to others of her choosing. She told the neighbors that the children should not have the land. When the will was made Margaret was with the testator, making suggestions and doing part of the talking. After it was made she expressed her approval of its contents, and from that time until the death of John Tyner she exerted her influence to prevent him from becoming reconciled to the children and changing the will. She said "the will was made the way she wanted it, and was not going to be changed." It is apparent that she earnestly desired to influence her husband in the making of his will, and that she was induced to do this by her dislike of the children and her desire to have the land go to her own relatives. She was also to

some extent personally benefited by the will, as she received all the law would give her, and in addition thereto she was given complete control over all the personal property during her life.

But the ultimate question is whether her influence actually induced the will. It is certain that it was exerted for the purpose of controlling the making of the will and the disposition of the property. John Tyner stated to disinterested parties that Margaret would not permit him to leave the land to the children. He told the witness Flannery that he gave the boys nothing, because Margaret did not want them to have anything. He also told Mrs. Joego that he was not going to give any of the land to his children, because Margaret "would not allow him to." The same statement was made to Mary Tyner. All of this evidence stands uncontradicted. Margaret was present at the trial, but was not called as a witness. John Tyner's wife and children were the natural beneficiaries of the property, and there is nothing to show that the children were not deserving of his consideration. The attempt to show that they had improperly left home and neglected their father failed completely. There being evidence of this character in the case, the inofficious, harsh, and inequitable character of the will may also be taken into consideration. The Varians, who received the homestead, are not of the blood of the testator, but are the nephews of his wife. As far as the record shows they had never done anything for John Tyner, except farm the land for a time, nor was he under any obligation to them. The evidence thus presents a much stronger case than appeared in *Clarity v. Davis*, 92 Minn. 60, 99 N. W. 363, where Chief Justice Start, speaking for the court, said: "In view of these admitted facts and the relation existing between the legatee and the testator, the claim of the appellant that the burden was upon the respondent to show by clear and satisfactory evidence that the testator was mentally competent to make his will and that its execution was not procured by undue influence and fraud is, as it must be, conceded by the respondent."

Judgment reversed, and new trial ordered.

ALL WILLS MUST BE IN WRITING, EXCEPT NUNCUPATIVE WILLS

HUBBARD V. HUBBARD

8 N. Y. 196 (1853)

Proceedings before the surrogate of Suffolk county by Maria J. Hubbard to establish an alleged nuncupative will of her deceased husband, William L. Hubbard. William L. Hubbard was master and owner

of a coasting schooner of Greenport, Long Island. While on a return trip from Philadelphia with a load of coal, and lying at anchor inside the Delaware breakwater on account of headwinds, he was taken sick with Asiatic cholera, and died the same day. The vessel was anchored in tide-water about a mile from the main-land, the same distance from the open sea, and three miles from the nearest place of settlement on shore. While deceased was suffering from his disease, and about an hour before he died, being of sound mind and memory, he was asked if he had a will and replied that he had not. He was then asked as to the disposition of his property, and in reply stated, in the presence of the surrounding seamen, that he wished his wife to have all his personal property. Beckwith, his mate, asked him if he wished her to have his real property too, and he replied, "Yes, all." Beckwith then asked him what he should tell his wife, and he replied, "Tell her I loved her to the end." Beckwith again asked him whom he wanted to settle his affairs, and he replied, "I want you to do it." He did not ask any one to bear witness that what he stated was his will. These conversations being proved by four witnesses, the surrogate adjudged them a good nuncupative will. Elias Hubbard, father of the deceased and his heir at law, appealed to the special term, where the decree of the surrogate admitting the will to probate was reversed. On a further appeal the judgment of the special term was reversed, and Elias Hubbard appealed to this court.

MASON, J. It is provided in this state by statute that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea. 2 Rev. St. p. 60, sect. 22. As to the wills of soldiers in actual service and mariners at sea, they are left entirely untrammelled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. II. c. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills, 1 Vict. c. 26, sect. 11. The testator was a mariner, within the meaning of the statute. The courts have given a very liberal construction to this exception in behalf of mariners, and have held it to include the whole service, applying equally to superior officers, up to the commander in chief, as to common seamen. *In re Goods of Hayes*, 2 Curt. Ecc. 338; 1 Williams, Ex'rs, 97. It has been held to apply to the purser of a man of war, and embraces all seamen in the merchant service. *Morrell v. Morrell*, 1 Hagg. Ecc. 51; *In re Goods of Hayes*, 2 Curt. Ecc. 338; 1 Williams, Ex'rs 97. This will was made at sea. In legal parlance, waters within the ebb and flow of the tide are considered the sea. *Bouv. Law Dict. tit. "Sea;" Ang. Tide-Waters*, 44-49; *Thackarey v. The Farmer*, Gilp.

528; *The Thomas Jefferson*, 10 Wheat. 428; *Baker v. Hoag*, 7 N. Y. 561. Lord Hale says the sea is either that which lies within the body of the county or without it; that an arm or branch of the sea within the "fauces terroe," where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, but that part of the sea which lies not within the body of a county, is called the main sea, or ocean. Harg. Law Tracts c. 4; p. 10; Smith. Const. § 588. He adds, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows;" and in this he follows the exact definition given by the Book of Assizes, 22 Id. 93; and this is the doctrine recognized by the courts of this country. *Thackeray v. The Farmer*, Gilp. 524; *U. S. v. Grush*, 5 Mason, 290; *U. S. v. Wiltberger*, 5 Wheat. 76-94; *U. S. v. Robinson*, 4 Mason, 307; *U. S. v. Ross*, 1 Gall. 626.

The courts in England have gone to the utmost verge of construction in extending this exception in behalf of the seamen. In a case which came before the prerogative court of Canterbury in 1840, when the deceased was mate of her majesty's ship *Calliope*, and while the vessel was in the harbor of Buenos Ayres, he obtained leave to go on shore, when he met with a serious fall, and was so severely injured that he died on shore a few days after. Immediately after the accident he wrote on a watch bill with a pencil his will, and which was unattested, but which was cut out and certified to by the officers on board the ship, and the court held it a good will of a seaman at sea, and ordered it to probate. *In re Goods of Lay*, 2 Curt. Ecc. 375. The common-law doctrine in regard to nuncupative wills was borrowed from the civil law. *Drummond v. Parish*, 3 Curt. Ecc. 522, 531, et seq. By the civil law, the strict formalities both in the execution and construction of nuncupative wills of soldiers, were dispensed with; and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament was held good if they were in actual service. Just. Enst. lib. 2, tit. 11; 1 Lomax, Ex'rs, 40. The civil law was extremely indulgent in regard to the wills of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. 1 Bl. Comm. 417; 1 Lomax, Ex'rs, 40, 41. The common law, however, has not extended this privilege so far as the civil. 1 Bl. Comm. supra. Blackstone says that soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels without those forms, solemnity, and expenses which the law requires in other cases.

The rules, however, which are to be observed in making wills by soldiers and mariners, are the same by the common law and yet it must

be confessed that the formalities which are necessary to be observed in the making of wills by soldiers and seamen are not defined with any very satisfactory precision in any of the English elementary treatises upon the subject of wills. Swinborne says that those solemnities only are necessary which are *juris gentium*. Swinb. Wills, pt. 1, § 14. Before the statute the ecclesiastical courts to whose jurisdiction the establishment of personal testaments belonged required no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. 1 Rob. Wills, 147. A will of personal estate, if written in the testator's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, was held effectual, provided the handwriting could be proved. 1 Rob. Wills, 148. And so if written by another person by the testator's direction, and without his signing it, it was held good. *Id.* 148. It is laid down in books of very high authority that a nuncupative testament may be made, not only by the proper motions of the testator, but also at the interrogation of another. Swinb. Wills, pt. 1, § 12, p. 6; Lomax, Ex'rs, 38; 1 Williams, Ex'rs, 102. And Swinborne says, "As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly so that his meaning appears," (2 Swin. Wills, pt. 4, § 26, p. 643;) and he says, concerning the solemnities of the civil law to be observed in the making of testaments, soldiers are clearly acquitted from the observation thereof, saving that, in the opinion of divers writers, soldiers, when they make their testaments, ought to require the witnesses to be present. 1 Swinb. Wills, pt. 1, § 14, p. 94. It is necessary, however, that the testamentary capacity of the deceased and the *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved in the case of nuncupative will. 1 Williams, Ex'rs, 102; Lemann v. Bonsall, 1 Addams, Ecc. 389, 390.

In the present case the evidence most clearly shows that the deceased was of sound mind and memory, and I think the evidence in the case satisfactorily established the *animus testandi* at the time of the alleged nuncupation. He told his mate, Beckwith, to tell his wife that he loved her till the end. He was extremely sick, and undoubtedly apprehending death; and when asked if he had a will, he replied that he had not; and, on being asked what disposition he wished to make of his property, he said he wished his wife to have all of his personal property and at the same time requested Beckwith to settle his affairs and see to his business. It should be borne in mind that as well the testator as all of the witnesses present were seamen, and were undoubtedly acquainted with the rights of mariners in regard to making their wills. They evidently understood it to be a will, and spoke of it as such; and I think

the animus testandi is satisfactorily established. The evidence is quite as strong in the case under consideration as it was in the case of *Parsons v. Parsons*, 2 Greenl. 298, 300, where the testator was asked to whom he wished to give his property, and replied, "To my wife; that is agreed upon;" and the supreme court of Maine sustained the will in that case. I am aware that it is said in some of the books that it is essential to a nuncupative will that an executor be named. But this is no more essential than in a written will. *Rolle. Abr.* 907; *How v. Godfrey*, Finch, 361; *Prince v. Hazleton*, 20 Johns. 522. I am inclined to think, however, that the evidence is sufficient, in the present case, to show that the testator intended to make Beckwith his executor, but it is not necessary that he should have named one. It is not necessary to decide whether the mariner must make his will in his last sickness and in extremis, as was held to be the case under our former statute of wills, (*Prince v. Hazleton* 20 Johns. 503,) and as is required under the statutes of several of our sister states, (*Boyer v. Frick*, 4 Watts & S. 357; *Baker v. Dodson*, 4 Humph. 342; *Offutt v. Offutt*, 3 B. Mon. 162; *In re Will of Yarnall*, 4 Rawle, 46; *Werkheiser v. Werkheiser*, 6 Watts & S. 184; *Winn v. Bob*, 3 Leigh, 140; *Mason v. Dunman*, 1 Mumf. 456; *Portwood v. Hunter*, 6 B. Mon. 538; *Tally v. Butterworth*, 10 Yerg. 501; *Parsons v. Parsons*, 2 Greenl. 298;) for there can be no doubt upon the evidence in this case, but this will was made both in extremis, and in the last sickness, and under circumstances which precluded the making of a written will. I think that the factum of this nuncupative will is clearly established by the evidence in the case, and also the testamentary capacity of the deceased, and that the animus testandi at the time of the alleged nuncupation is sufficiently apparent from the evidence in the case, and that the judgment of the supreme court should be affirmed.

Judgment affirmed.

A WILL MAY BE SIGNED IN PENCIL

MYERS v. VANDERBELT

84 Pa. 510 (1877)

MERCUR, J. This case presents the single question whether an instrument wholly written and signed with lead pencil may be a valid will.

The sixth section of the act of assembly of 8th April, 1833, declares: "Every will shall be in writing." It does not indicate the material on which it shall be written, nor the instrument or materials with which the writing shall be impressed. In *Blackstone's Com.* book 2, p. 297,

it is said: "A deed must be written or I presume printed, for it may be in any character or any language, but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed." This writer does not prescribe whether the writing shall be in ink or in pencil. He stops with declaring the substances on which it shall be made.

Writing is the expression of ideas by visible letters. It may be on paper, wood, stone, or other material. The ten commandments were written with the finger of God on tables of stone. Exodus, XXXI, 18. The general rule undoubtedly is, that, whenever a statute or usage requires a writing, it must be made on paper or parchment; but it is not essentially necessary that it be in ink. It may be in pencil. ¹ This view is sustained by numerous authorities, as applied to contracts generally. *Chitty on Cont.* 91; *Jeffery v. Walton*, 2 E. C. L. R. 385; *Gray v. Physic*, 11 E. C. L. R. 443; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Clason v. Bailey*, 14 Johns. (N. Y.) 490.

The same rule applies to promissory notes. *Byles on Bills*, 134; *Story on Prom. Notes*, §11; *Gray v. Physic*, supra; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245; *Partridge v. Davis*, 20 Vt. 499; *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

So a book account made in pencil was held admissible in evidence as a book of original entries. *Hill v. Scott*, 12 Pa. 169. In 1 Redfield on Wills, §17, pl. 2, it is said "the English Statute of Frauds expressly required that a will of lands should be in writing. But it has been held that a will written in pencil, instead of ink, would be good," citing in re *Dyer*, 1 Hag. Ec. 219. That a will written in pencil may be valid was also ruled in *Raymes v. Clarkson*, 1 Phil. Ecc. 22; *Dickenson v. Dickenson*, 2 Phil. Ecc. 173.

In *Main, et al. v. Ryder*, 84 Pa. 217, speaking of the signature of a testator, it was said the manifest object of the act is to permit a will to be signed as any other written instrument may be signed. So we think the authorities establish that a valid will may be drawn with the same materials that will suffice for the drawing of any written contract. As was well said by Mr. Justice Coulter in *Hill v. Scott*, supra, they abundantly prove that a writing in pencil is equivalent and tantamount to a writing in ink.

The validity of a will written or signed with a lead pencil was referred to, but left undecided, in *Patterson v. English*, 71 Pa. 459; but the opinion by Mr. Justice Williams contains a strong declaration against the propriety of writing or signing in that manner. The reason given against it is the facility with which the writing may be altered or effaced. There is force in this suggestion. No prudent scrivener will write a will

in pencil, unless under extreme circumstances. Whenever written, any appearance of alteration should be carefully scrutinized. Yet inasmuch as the statute is silent on the question, we cannot say the mere fact that it is written or signed in pencil, thereby makes it invalid. It is nevertheless a writing, known and acknowledged as such by the authorities, and fulfils the requirement of the statute.

Judgment affirmed.

NECESSITY OF SUBSCRIPTION

IN RE SEAMAN'S ESTATE

ALBRIGHT, ET AL. V. NORTH, ET AL.

146 Cal. 455, 80 Pac. 700 (1905)

Per Curiam. A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered, the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle, like ordinary legal cap. Upon the upper portion of the first page was a printed heading and introduction, occupying about one-fourth of the page. In the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will and Testament of," under which the scrivener had written, "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written,

"Henry Seaman," and underneath his name the word "witness," and underneath that the names, "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank.

It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose only the intention of the Legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Section 1276, Civ. Code, requires every will, other than nuncupative or olographic, to be "subscribed at the end thereof" by the testator, in the presence of two attesting witnesses, each of whom must, in his presence and at his request, sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions are incorporated into the Civil Code for adoption by the state by David Dudley Field, and, in their report of a Civil Code to the Legislature of 1871, the code commissioners of this state refer to this Code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (St. 1 Vict. c. 26), but the decisions under that as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterwards the same judge who gave this construction, as did also the Privy Council in affirming his judgment, stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will

after the deceased had executed it. (*Smee v. Bryer*, 1 Robt. Eccl. 616; *Williams on Executors*, *67); and the statute was construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that in 1852 Parliament passed an explanatory act (St. 15 Vict. c. 24) known as "Lord St. Leonard's Act," which provided that the will should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be effected by the circumstances that "a blank space shall intervene between the concluding end of the will and signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276, Civ. Code, that the decisions thereunder are not entitled to any consideration in interpreting the section. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. See, also, *Matter of Conway's Will*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed, is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will. "The act of authentication must take place at the termination of the testamentary disposition." *McGuire v. Kerr*, 2 Bradf. Sur. (N. Y.) 244. "To say that, where the name is, there is the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must be the name of the testator be subscribed." *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of O'Neil's Will*, 91 N. Y. 522; *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294.

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision

does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name, without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate. See *Soward v. Soward*, 1 Duv. (Ky.) 126.

Appellants have cited the case of *Gilman's Will*, 38 Barb. (N. Y.) 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but, as a construction to be given to the statute, it does not meet with our approval, and is, moreover, inconsistent with the construction given in the above cases cited from the Court of Appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the Legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. *McGuire v. Kerr*, 2 Bradf. Sur. (N. Y.) 244; *Matter of O'Neil's Will*, 91 N. Y. 516; *Matter of Andrews' Will*, 43 App. Div. 394, 60 N. Y. Supp. 141; s. c., affirmed, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; *Matter of Hewitt's Will*, 91 N. Y. 261; *Matter of Conway's Will*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; *Soward v. Soward*, 1 Duv. (Ky.) 126; *Ramsey, v. Ramsey*, 13 Grat. (Va.) 664, 70

Am. Dec. 438; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Wineland's Appeal*, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571. "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions." (*Sisters of Charity v. Kelly*, 67 N. Y. 409) "or by judicial construction" (*Matter of Whitney*, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616), "or defeated by lax interpretation" (*Glancy v. Glancy*, 17 Ohio St. 134). "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose." *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity for such alteration is permitted, the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." *Matter of the Will of O'Neil*, 91 N. Y. 516.

It is true, as suggested by the appellants, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the Legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested." See *Heady's Will*, 15 Abb. Prac., N. S. (N. Y.) 211; *Matter of Collins*, 5 Redf. Sur. (N. Y.) 20. In *Estate of Blake*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (*Sisters of Charity v. Kelly*, 67 N. Y. 415); and, as they constituted a part of his will, the end thereof was not reached until they had been written upon the paper, and, as his name was subscribed to the testamentary clause, which imme-

diately followed these items, it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in *Soward v. Soward*, 1 Duv. 126. The statute of Kentucky required the witnesses, as well as the testator, to "subscribe" the will with their names, which the courts of that state construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the paper enveloping and enclosing the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In *Roy v. Roy's Ex'r*, 16 Grat. (Va.) 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter, and the words, "David M. Roy's Will," were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Patterson v. Ransom*, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that the testator intended the space signed by him to be the end of the will, if, upon an inspection of the instrument, it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its physical execution is in accordance with these requirements. *Matter of Hewitt's Will*, 91 N. Y. 261; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Patterson v. Ransom*, 55 Ind. 402.

Under these considerations, it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed.

SUBSCRIBING WITNESSES MUST SEE THE TESTATOR SIGN
HIS NAME

IN RE MACKAY'S WILL

110 N. Y. 611, 18 N. E. 433 (1888)

EARL, J. The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and, while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready, awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying, as he did so, "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any," to which he replied, "Yes, he wanted it done, and off his mind;" and then the witness Mulligan, who had joined in this conversation, signed, the instrument, as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will; but he handed it to them so folded that they could see no part of the writing except the attestation clause, and they did not see either his signature or seal.

There would undoubtedly have been a formal execution of the will in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In *Lewis v. Lewis*, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument, was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute. In that case Allen, J., writing the opinion, said: "A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed." In *Mitchell v. Mitchell*, 16 Hun, 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper, and said: "I

have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons thereupon signed the paper as witnesses, under the attestation clause. The deceased then took the paper, and said: "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation.

It is true that in *Willis v. Mott*, 36 N. Y. 486, 491, *Davies, C. J.*, writing the opinion of the court, said that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere dictum, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible, and sometimes the purpose of the statute might be frustrated.

We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs. All concur.

THE DOCUMENT MUST BE SIGNED IN THE PRESENCE OF THE SUBSCRIBING WITNESSES

MANNERS, ET AL. V. MANNERS

72 N. J. Eq. 854, 66 Atl. 583 (1907)

MAGIE, ORDINARY. The appeal is from a decree refusing probate to a paper writing offered as the last will and testament of Elizabeth V. Manners. The paper writing purported to be signed by the testatrix. There was a perfect attestation clause, to which was appended the signatures of two witnesses, and these witnesses were called and testified on the application for probate.

The perfect attestation clause appended to the will was *prima facie* evidence of due execution. The *prima facie* effect of such a clause,

however, may be overcome by testimony, and even by the testimony of the subscribing witnesses. *Berdan's Case*, 65 N. J. Eq. 681, 55 Atl. 728.

The questions presented are (1) whether their testimony overcomes the declaration of the attestation clause of the will as to publication by the testatrix, and (2) whether their testimony overcomes the attestation clause in respect to the signature of the will.

The evidence renders it clear that the signature was not made in the presence of the subscribing witnesses. When they entered the room in which the testatrix sat, they found there the scrivener who had drawn the will and who had requested them to come into the house to witness its execution. Thereupon the scrivener said that the testatrix had made her will and wanted them to witness it. The witnesses expressed the opinion that this was spoken in a voice loud enough to be heard by the testatrix, who sat some eight or ten feet distant in the same room, but they both declare that she made no sign of assent, and both agree that she did not sign the paper in their presence.

It is a settled law that a testatrix may publish a will by assenting to a statement made in her presence. Such an assent may be made by some act or sign. If the scrivener declared, in the hearing of the testatrix, that the paper was her will and she had then signed it, publication might be inferred; but, when there was no act or sign by the testatrix, I think that the proof discloses that there was no publication by the testatrix.

As the paper writing was not signed in the presence of witnesses, it is by our statute invalid, unless the testatrix acknowledged "the making thereof;" i.e., the making of the signature in their presence. On this subject the evidence shows that the scrivener said, apparently with reference to the paper writing which was in the room and on the table, "This is her name." Testatrix remained silent, and no act or sign was made by her to that statement.

But, if she had signified her assent to the statement of the scrivener, in my judgment, the acknowledgment which the statute requires would not be made out. An acknowledgment that the signature was her name is not an acknowledgment that it was made by her, and I think nothing less than such an acknowledgment will satisfy the statutory requirements.

In my judgment the decree refusing probate must be affirmed.

**A WILL MUST BE WITNESSED IN THE "PRESENCE OF THE
TESTATOR"**

RIGGS v. RIGGS

135 Mass. 238 (1883)

MORTON, C. J. The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. St. c. 92, §6; Publ. St. c. 127. §1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aikin v. Weckerly*, 19 Mich. 482, 505; *Downie's Will*, 42 Wis. 66; *Tribe v. Tribe*, 13 Jur. 793; *Jones v. Tuck*, 48 N. C. 202; *Graham v. Graham*, 32 N. C. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278; *Fincham v. Edwards*, 3 Cur. Ecc. 63.

It would be against the spirit of our statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe "in his presence;" but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestae*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed. Decree affirmed.

REVOCATION BY BURNING, TEARING, CANCELING,
OBLITERATING, MUTILATING, OR
OTHERWISE DESTROYING

CHEESE V. LOVEJOY

Court of Appeal, 2 P. D. 251 (1876)

This was an action to obtain probate in solemn form of the will, dated the 3d of July, 1849, of John Harris, who died on the 13th of May,

1876, with three codicils, one dated the 3d of July, 1849, and the two others the 21st of September, excluding from the probate all the alterations and interlineations appearing on the will.

That those instruments were originally well executed was not seriously contested. The plaintiff under the will was a beneficial legatee of a considerable part of the testator's personal estate and a devisee of considerable part of his freehold estate. The heir at law and next of kin contended that the testamentary instruments had been revoked.

The evidence as to revocation was to the following effect: The will and codicils were at the testator's death found upon the kitchen table. The testator had drawn a pen through the lines of some part of the will, leaving the words perfectly legible, and had written on the back, "All these are revoked." A housekeeper, who had been nine years with the testator and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them and they were good for nothing, and that the testator had in her presence taken up this will and thrown it among a heap of waste papers on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting room under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting room among a quantity of other papers, and that she took it out of the sitting room, where it was lying by the coal box along with other scraps of paper, and took it into the kitchen, where she put it on the table. That it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again.

The judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

JAMES, L. J. We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below; "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two."

Baggallay and Cotton, L. JJ., concurred.

WILL TEARING A WILL AMOUNT TO A REVOCATION?

DOE D. PERKES v. PERKES

3 B. & Ald. 489 (1820)

Ejectment for messuages and lands in the parish of Walsall. Plea, Not guilty. At the trial before Holroyd, J., at the last assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir at law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall: "Joe you shall see if I have done anything for the rascal or not. I have made him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands together, as if in an attitude of prayer, and said: "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will; and now W. E. Taunton moved for a new trial.

ABBOTT, C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no farther, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now if the cancella-

tion had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

BAYLEY, J. I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped in medio, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

HOLROYD, J. I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set up the will again. The Statute of Frauds says "that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the same by the testator," etc.; but, in order to effect this, the act of tearing, etc., must be complete. I left it to the jury to say, whether that was so, and they were of opinion, that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

BEST, J. I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation: for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no further, and that the cancellation was complete; but here there is evidence, that he intended to go farther, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in Blackstone is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

Rule refused.

WHERE THE SIGNATURES TO A WILL HAVE BEEN
SCRATCHED AWAY, IT IS REVOKED AND
CAN NOT BE PROBATED

IN RE GOODS OF MORTON

L. R. 12 P. D. 141 (1887)

Henrietta G. Morton, late of Newcastle-on-Tyne, deceased, died January 26, 1887, having duly executed a last will, bearing date September 16, 1853. After her death the will, which had remained in her possession, was found in a trunk with the signatures of the testatrix and the attesting witnesses scratched out as if with a penknife. At the bottom of the will there was a memorandum in the handwriting of the deceased, dated "November, Saturday, 1861," but not executed, whereby for reasons given the will was declared to be cancelled.

Searle, moved for a grant of administration to Sarah Francis Morton, the sole surviving sister and next of kin of deceased, as in case of intestacy.

BUTT, J. I do not think there is any difficulty in the case. What the testatrix did may be regarded as a lateral cutting out. The paper is not pierced, but the signatures are scratched away. I think the will has been revoked, and I grant administration to the applicant.

A LATER WILL DOES NOT NECESSARILY REVOKE A WILL
ALREADY MADE, UNLESS THE TWO
ARE INCONSISTENT

CADELL V. WILCOCKS

High Court of Justice, Probate Division, page 21 (1898)

SIR F. H. JEUNE, President. The question in this case is, which of three wills made respectively on April 26, 1890, July 5, 1894, and September 5, 1895, by the testatrix, Mrs. Lucy Biddulph, should be admitted to probate.

The father of the testatrix, Robert Bickerstaffe, left £16,000 among his four daughters in equal shares for life, with power of appointment to each of them by will amongst her children, and, in default of appointment, to her children equally.

At the time of the will of 1890, the testatrix had two daughters, Anne, then married, and Gertrude, then a widow, and three sons, Middleton, Assheton, and Franc. By the will of 1890, the testatrix, after revoking all previous wills, gave her daughter Gertrude "the sum

of £4,000 absolutely for her sole use and benefit," describing it as "being the sum left to me by the will of my father the late Robert Bickerstaffe." She then bequeathed £50 to her steward, Finton McDonald, and the residue of her property to her five children equally, and appointed her sons, Middleton and Assheton, executors. It was not denied before me that this was a good execution by the testatrix of the limited power of appointment vested in her by the will of her father.

Between the wills of 1890 and 1894 the daughter Gertrude married Dr. Nevil Cadell, and I understand that the sons Middleton and Assheton received a benefit under the will of an uncle, the testatrix's brother. By her will of 1894, the testatrix bequeathed to her daughter Gertrude "the sum of £4,000 for her own absolute use and benefit, and to dispose of as she may think fit." She then gave £50 to her steward, Finton McDonald, and the residue of her property to her children Franc and Gertrude equally, appointed Franc, Gertrude, and Dr. Nevil Cadell executors.

Between the wills of 1894 and 1895, Franc, the son of the testatrix, and also the steward died. A letter of the testatrix containing her instructions for the will of 1895 was produced to me, but I do not think it material. By the will of 1895 the testatrix made a bequest to her daughter Gertrude in these terms: "All the property real freehold or personal wheresoever situate of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit," and gave the same, in case of her daughter predeceasing her, to her daughter's husband, Dr. Nevil Cadell, and appointed her daughter and Dr. Cadell executrix and executor.

Neither the will of 1894, nor the will of 1895, contained any words of revocation; and it was not disputed before me that neither the terms of the will of 1894, nor those of the will of 1895 were sufficient to effect a valid execution of the limited power of appointment vested in the testatrix.

I think that this case is governed by the familiar principle of law stated in *Williams on Executors* (9th ed.), p. 138, and approved by Lord Penzance in *Lemage v. Goodban*, 1 P. & D. 57, that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

In this case there was clearly no express revocation, in whole or in part, of the will of 1890 by either the will of 1894 or the will of 1895.

I assent to Mr. Inderwick's contention that, had there been a general clause of revocation in either the will of 1894 or that of 1895, it would have revoked the whole will of 1890, including the execution of the power contained in it. The opinion indeed of the Delegates in the case of *Hughes v. Turner*, 4 Hagg. Ecc. 30, at page 71, if correctly reported, would appear to be to the effect that a clause of revocation per se does not revoke the portion of an earlier will which has executed a power; and in *In the Goods of Merritt*, 1 Sw. & Tr. 112, and in *In the Goods of Joys*, 4 Sw. & Tr. 214, Sir Cresswell expressed a similar opinion. It might be considered doubtful whether the case of *Sotheran v. Dening*, 20 Ch. D. 99, in the Court of Appeal overruled those authorities, because weight was given to the consideration, which arose in that case, that by virtue of the 27th section of the Wills Act a general bequest operated on the subject-matter of the power of appointment, and so strengthened the evidence in favor of an intention to revoke its previous execution. But in *In re Kingdon*, 32 Ch. D. 604, the question of revocation by a general revocatory clause arose simpliciter, there being no subsequent provision relating to the subject-matter of the power in question, and Kay J., clearly considered that he was justified by the authority of *Sotheran v. Dening* (supra) in holding that a will executing a power was revoked in toto by general words of revocation in a subsequent will. The effect of his decision is, I venture to think, that on this point of law common sense at last prevailed. I cannot understand why express words, revoking all previous wills, should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents. But, in the present instance, there are no express words to revoke the will of 1890.

Next, is there anything in the wills of 1894 or 1895 inconsistent with the execution of the power in the will of 1890, or, in other words, is there anything that by implication effects a revocation of that execution? It is not necessary to consider whether, if the power of appointment in this case had been general and not, as it was, limited, the general bequests in the wills of 1894 and 1895 would have been not only, by virtue of the 27th section of the Wills Act, effectual to execute the power, but also sufficient to revoke a previous execution of it. It is, I think, clear that these general words of bequest, which do not execute the limited power, as the 27th section of the Wills Act has no application, cannot revoke or affect its previous execution. The wills of 1890 and 1895 can, therefore, stand together; and, subject to proof in common form, there should be probate of both of them. The will of 1894 I regard as revoked by that of 1895, as both wills profess to deal with the whole of the testatrix's own property.

WHERE A WILL IS CONDITIONED ON AN EVENT WHICH
DOES NOT COME TO PASS, THE INSTRUMENT
CAN NOT BE PROBATED

EATON V. BROWN

193 U. S. 411, 24 Sup. Ct. 487 (1904)

Mr. Justice Holmes delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

"Washington, D. C. Aug. 31" /001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, which is in the possession of Mr. H. H. Brown to go to the Methodist Church at Bloomingburgh. All the rest of my property both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C. All I have is my own hard earnings and I propose to leave it to whom I please.

"CAROLINE HOLLEY."

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicile of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition, that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the factum of the instrument. *Pohlman v. Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted

facts, that it is inoperative in the event which has happened. *Parsons v. Lance*, 1 Ves. Sr. 189; *S. C., Ambler*, 557; 1 Wils. 243; *Sinclair v. Hone*, 6 Ves. 607, 610; *Roberts v. Roberts*, 2 Sw. & Tr. 337; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" (return) are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon v. Damon*, 8 Allen (Mass.) 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a common place. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody v. Conly*, 27 Grat. (Va.) 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands.

We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith v. Cabell*, 19 Grat.

(Va.) 758, 783. And then she goes on to say that all that she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons v. Lanoe*, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no court of equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland, and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. *Ambler*, 561; 1 Ves. Sr. 192.

It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return (which I will, no preventing Providence)." *Todd's Will*, 2 W. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the Goods of Porter*, L. R. 2 P. & D. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 P. D. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. In *In the Goods of Mayd*, 6 P. D.

17; In the Goods of Dobson, L. R. 1 P. & D. 88; In the Goods of Thorne, 4 Sw. & Tr. 36; Likefield v. Likefield, 82 Ky. 589, 56 Am. Rep. 908; Bradford v. Bradford, 4 Ky. Law Rep. 947; Shipwith v. Cabell, 19 Grat. (Va.) 758, 782-784; French v. French, 14 W. Va. 458, 502. Decree reversed.

INCORPORATION OF DOCUMENTS IN WILL BY REFERENCE

APPEAL OF WILLIAM JENNINGS BRYAN, ET AL., FROM PROBATE

77 Conn. 240 (1904)

Appeal by William Jennings Bryan, individually and as trustee, from a decree of the Superior Court for New Haven County which affirmed a decree of the Probate Court refusing to approve a writing as part of the will of Philo S. Bennett, deceased. (Affirmed.)

The facts are stated in the opinion.

Torrance, Ch. J., delivered the opinion of the court:

The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its twelfth clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000) in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate, there were also offered for probate, as a part of it, under the twelfth clause of the will, two writings herein-after referred to as exhibits B and C. The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits, and from that part of its decree an appeal was taken to the superior court by William J. Bryan, individually and as trustee under the will, as he claims it to be. The will admitted to probate is, in the record, called "exhibit A," while exhibits B and C are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit B is a letter from the testator to his wife, of which the following is a copy:

New York, 5-22-1900.

MY DEAR WIFE:—

In my will just executed I have bequeathed to you seventy-five thousand dollars, (\$75,000) and the Bridgeport houses, and have, in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make

bountiful provision for those you desire to remember in your will. In my will you will find the following provisions: I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000) in trust, however, for the purpose set forth in a sealed letter which will be found with this will.

It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Nebr., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you, alone.

With love and kisses,

P. S. BENNETT.

Exhibit C was a typewritten duplicate of exhibit B, except that the words, "with love and kisses, P. S. Bennett," at the end of exhibit B, were not contained in Exhibit B, nor was exhibit C signed by the testator. Respecting these exhibits, the appellant, in the superior court, offered evidence tending to prove the following facts: That about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator and Mr. Bryan and his wife prepared a blank draft form of the will which was subsequently filled out and executed, and that exhibit C was then also prepared as a blank draft form which exhibit B was to be, and was subsequently drawn; that exhibit B was in the handwriting of the testator and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. P. S. Bennett and by her alone, after my death. P. S. Bennett, (Seal);" that the testator, on the day after the date of the will, placed said will and said envelope containing exhibit B in his box in a vault in the Wool Exchange building, in New York City, where they remained as he put them until after his death,

the will being "separated from said letter and said sealed envelope;" and that exhibit C, from the time it was drawn up, remained in Bennett's custody till after his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault Wool Exchange." The appellant then offered exhibit C in evidence as part of the will, claiming that it was the original and equivalent of the paper exhibit B, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter exhibit B, and the court excluded it. The appellant also offered parol evidence tending to prove that exhibit B was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that exhibit B and C "are not, either separately or together, a part of the last will of said Philo S. Bennett, deceased," and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated in this way: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2) that, even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter exhibit B shows on its face an intent on the part of the testator that it should not constitute a part of his will. As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but, in thus resting our decision upon the second ground, we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground, a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may by reference in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it, and that, too, whether the document referred to is or is not a dispositive one; and one of the leading cases upon this subject is that of *Allen v. Maddock*, 11 Moore P. C. C. 427, decided in 1858. This is known as the "doctrine of incorporation by reference," and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in

a signed instrument, so as to constitute a memorandum in writing under the statute of frauds. The English rule appears to prevail in many of our sister states, but the question whether it prevails in this state, and, if so, with what limitations and under what conditions, was left undetermined in *Phelps v. Robbins*, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions, but, for the purposes of the argument, we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here. Two of the conditions without which the English rule will not be applied are concisely, but we think correctly, stated in *Phelps v. Robbins*, 40 Conn. 250, as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But, before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt." *Re Yound*, 123 Cal. 342, 55 Pac. 1012. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document." *Smart's Goods* (1902), P. 238. Tested by the rules as thus laid down in the case above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question there, a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and, if we assume that the reference calls for a letter from the

testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will. "The vice is that no particular paper is referred to." *Phelps v. Robbins*, 40 Conn. 273. Such a reference as is made in the present will is in fact, as well as in law, no reference at all. Certainly it is not such a reference as the rules, under the doctrine of incorporation by reference, require in the case of wills. A reference so defective as the one here in question cannot be helped out by what is called "parol evidence," for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills.

We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document. Assuming, then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

There is no error.

The other judges concur.

CONSTRUCTION AND EFFECT OF WILLS

DICKISON V. DICKISON

131 Ill. 541 (1891)

Error to appellate court, second district.

This was an application of John A. Dickison to the county court for an order allowing him to share in the estate of Griffith Dickison, deceased. The county court disallowed his application, which order was affirmed by the circuit and the appellate courts. He appeals.

Affirmed.

SHOPE, J. April 9, 1874, Griffith Dickison, then in life, made his last will and testament. At that time, it is conceded for the purposes of this appeal, he had 10 children. In and by clauses 2 to 8, inclusive, and clause 10, of the will, he made specific devises to his wife and 8 of the children severally. By clause 9 he made a specific devise to his two other children as follows: "Ninth. To my children, John Abraham and Mary Ann, I will, devise, and bequeath the west half of the northwest quarter of section twenty-seven, in township ten north, range seven east, in equal shares, to be in full of their portions of my estate, both real and personal, to be theirs, their heirs' and assigns' forever." The eleventh

clause of the will is as follows: "Eleventh. All the rest of the real estate of which I may die possessed shall be by my executor sold, also all the personal property I may have at my death shall be sold, and from the proceeds of such sales he shall first pay all my debts, etc. The remainder he shall divide amongst my heirs as follows: To my wife, Sarah A. Dickison, one-third part thereof: and the remainder to my children in equal portions, share and share alike, to be theirs, their heirs' and assigns' forever absolute." On the 7th day of March, 1882, there was executed by the testator in due form of law, and attached to the original will, the following codicil: "Whereas, I, Griffith Dickison, did on the ninth day of April, 1874, make devises to all my children then born; and whereas, since that date a son has been born to me, whom I have named Fred, make this codicil to my said will, to have the same force and effect as if it was a part of my original will: That is to say, I will, devise, and bequeath to my son Fred (certain described realty) in fee, and to my daughter, Roxie J. Hitchcock (certain described realty) in fee." The testator died March 14, 1886, and shortly thereafter said will, with the codicil annexed, was duly admitted to probate. Subsequently the executor reported to the county court that after payment of all claims, etc., he had in his hands \$9,214.05 for distribution under the residuary clause of the will, and asking an order of the court thereon. The question presented by this record is whether appellant, John A. Dickison, is entitled to participate in the distribution of that fund. That he was a child of the testator, and therefore fell within the designation of persons who were to take under the residuary clause of the will, is conceded. It must, therefore, be held that he is a distributee thereunder of the residuum in the hands of the executor, unless that clause is controlled by other portions of the will, so as to exclude him from participation; and this must depend upon the intention of the testator as expressed in his will. The sole purpose of construction of the instrument is to find and declare the intention of the testator, that effect may be given to such intention, when not contrary to public policy, or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible. 1 Redf. Wills, 334 et seq.: *Caruthers v. McNeill*, 97 Ill. 256; *Kennedy v. Kennedy*, 105 Ill. 350; *Taubenhan v. Dunz*, 125 Ill. 529, 17 N. E. Rep. 456, and cases cited. By the ninth clause of his will the testator devised to John A. (appellant) and Mary Ann, his son and daughter, as tenants in common, the tract of land therein described, "to be in full of their portion of my estate, both real

and personal; to be theirs, their heirs' and assigns' forever." The language here employed is neither ambiguous nor unintelligible. If understood in their ordinary and popular significance, as they must be, except where technical terms are used, the words convey a definite and certain meaning. The word "portion" in its commonly accepted meaning is the equivalent of part, share, or division. Worcester. "To be in full of their part or share or division of an estate," means to be the complete measure of such share, part, or division. Worcester. The evident intention of the testator was that the land devised was to be the complete measure of what these devisees should take or receive as their part, share, division, or portion of his estate. Nor is the construction less satisfactory if it be considered that the testator used the word "portion" in its technical legal sense. Technically a "portion" is defined to be: "The part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child." Bouvier. The devise would therefore be in full—i. e., the complete measure—of the part of the testator's estate given or devised, or the provision made by the testator for these devisees. The evident intention of the testator, as manifested by this clause of the will, was to limit the quantity of his estate to be taken or received by his son John A. and his daughter Mary A. to the specific devise of the land mentioned in clause 9. This intention is clearly and unambiguously expressed. The difficulty arises, however, not in respect of any uncertainty as to the intent expressed in this clause of the will, but because of the repugnancy existing between this and the eleventh, or residuary, clause. The latter clause provides, as we have seen, that all the rest and residue of the testator's real estate, not specifically devised, and all his personal estate, shall be sold by his executor, and after paying debts, etc., the remainder be divided among his heirs as follows: To his wife, one-third part thereof; "and the remainder to my children in equal portions, share and share alike, their heirs and assigns forever absolute." It will be observed that the testator here again uses the word "portion" as the equivalent of part or share.

It is apparent that if appellant and his sister Mary A. are held to be included in this general residuary clause the provision of clause 9, that the land therein devised shall be in full of all they shall receive from the estate of the testator, is rendered nugatory. There is, therefore, it is said, repugnance between these two clauses, and that in such case the later provision must control. The rule is well established in this state, as elsewhere, that when the clauses of a will are irreconcilable, and the repugnance invincible, the later clause will generally prevail. *Brownfield v. Wilson*, 78 Ill. 470; *Murfitt v. Jessop*, 94 Ill. 158; 3 *Jarm. Wills*, 705: 1 *Redf. Wills*, 443-445. In matters of so great solemnity

as making a testamentary disposition of property it cannot be presumed that a testator would purposely make inconsistent provisions, incapable of being carried into effect. Unlike conveyance by deed, in which the first complete grant leaves nothing in the grantor to be subsequently conveyed, a will remains ambulatory, and the latest expressed intention is to be given operation; and, as the testator might have changed his mind during the drafting of his will, there being no way of accounting for or removing the repugnancy, it will be presumed that he did, after writing the former clause, change his purpose, and that the subsequent clause gives expression to a later formed intention. The rule is adopted by the courts as an aid to finding the real intention of the testator, as finally expressed in his will, and arises out of the very necessity of the case, and rests upon the single presumption of fact of change of intention while writing the will. The fundamental rule of construction being, as we have seen, that the intention is to be found from a consideration of the whole will, and such construction given as will uphold all of its provisions, and give to each clause and part its just operation and effect, it follows that the presumption of the fact upon which the rule is predicated will never be indulged, or the rule applied, until it is found by the application of all other rules of construction that the difficulty is unsolved, and the clauses remain invincibly repugnant. Redf. Wills, 445-452, and cases cited: *Morrall v. Sutton*, 1 Phil. Ch. 532. The tendency—of modern American decisions at least—is towards reconciling the apparent repugnancy, if possible, without adopting unreasonable or absurd constructions; so much so, that it is stated by the learned author just cited “that it is now becoming very uncommon with us to hear a court declare a will, or any of its provisions, wholly inoperative by reason of repugnancy or uncertainty.” Page 453. The rule, therefore, which sacrifices the former cause, because inconsistent with a later one, is never applied, except upon failure to give such construction as renders the whole will effective, and allows each provision to stand. Hence it has been held that to enable the court to uphold all the provisions of the will it is permissible to resort to every reasonable intendment; to reverse the relative order of the devises or bequests; and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each. *Mutter’s Appeal*, 38 Pa. St. 314; *Covenhoven v. Shuler*, 2 Paige, 122; *Pruden v. Pruden*, 14 Ohio St. 251; *Langham v. Sanford*, 19 Ves. 641; *Brocklebank v. Johnson*, 20 Beav. 205; *Ridout v. Dowding*, 1 Atk. 419; *Hatfield v. Sneden*, 42 Barb. 615; *Crissman v. Crissman*, 5 Ired. 498. And so repugnant words, in whatever portion of the will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or trans-

posed or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested. *Holliday v. Dixon*, 27 Ill. 33; *Watlington v. Waldron*, 4 De Gex. M. & G. 259; *Boon v. Cornforth*, 2 Ves. Sr. 277; *Jones v. Price*, 11 Sim. 557. Further discussion of the general rule will be unnecessary as we are not required to go to so great length in the construction of this will as many of the cases have gone.

It is also a familiar rule in the construction of wills, that general provisions in a will must give way to specific provisions; that where there is a general devise of property in one part of the will, and a specific disposition of the same property in another part, these are to be regarded, generally, as excepted out of the general devise. *Redf. Wills*. 446, and cases cited. Moreover, a general residuary clause, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will generally be construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of; and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise. *Id.* The specific directions in the will, where the mind of the testator has been directly and intelligently directed to them, are much safer guides to his intention than general provisions, which do, by virtue of their generality, contravene the specific provision, but which might or might not have been so intended; and especially is this so where, as in this case, the general provision is a residuary clause, which, as we have said, might, as it generally is, have been inserted with the sole view of the disposition of any residuum of estate not before devised. Here the testator made specific devises to all his children of land, and accompanied the devise to appellant and his sister Mary Ann with the express provision that the land devised was to be in full of their portion of his estate, both real and personal. Nothing can be clearer than the intention, thus expressed, that neither appellant nor Mary A. should participate in the estate of the testator further than the specific devise made to them. It was to be, as we have seen, the complete measure of all they should take out of the estate of the testator, "both real and personal," excluding them from further participation. Following this clause comes a specific devise of other lands, without limitation, to another son, Griffith A., and then follows the general clause before quoted. By that clause the residue of the testator's property, real and personal, is to be sold, and, after the payment of debts, to be divided, one-third to the testator's widow, Sarah A. Dickison, and the remainder to his children, share and share alike. It is apparent that in making this clause the testator intended especially to provide for his wife, giving her one-third of the residue, which she

could not otherwise, as his widow, have taken, without renouncing the previous specific provision for her benefit. The care taken in naming her evinces the solicitude of the testator in her behalf, undoubtedly arising from the fact, as shown by the records, that no formal marriage had been solemnized between them, and at most a common-law marriage only existed, which might be contested. Beyond the naming of his then wife, no one else is named. The remainder of the residue is to be divided among his children without further designation. There are no other words indicating an intention to abrogate or destroy the limitation coupled with the devise to appellant. It is much more probable that the testator introduced the residuary clause primarily to protect his widow, and, secondly, to give effect to the limitation coupled with the devise in the ninth clause of the will by preventing any portion of his estate from becoming intestate estate, and distributable to his heirs, including appellant, than that he had changed his purpose after the writing of the second preceding clause. Especially is this so when we consider that all that portion of clause 9 repugnant to the residuary disposition could have been erased or expunged without in the least affecting the specific devise made.

The intention of the testator must control when it can be ascertained, and we are of the opinion that it is clearly manifest that the testator intended to exclude appellant from participation in his estate beyond the specific devise made to him; that the will, taken and considered as a whole, leaves no serious doubt of that intention. The testator had just previously excluded appellant from participation in any residue of his estate then existing or thereafter to be acquired, and undoubtedly, having in mind this provision, made the general provision subject to it. Nor is this rendered less certain by the codicil made by the testator. It is true that he therein says that he had, in and by his will, "made devises to all my children then born," but the purpose of the codicil, and to what devises the testator referred, is clearly apparent. Thereby he makes a specific devise to a son born subsequently to the making of the original will, and of the same kind as those specifically made to his other children. Indeed, he takes by the codicil the land specifically devised to his daughter Roxie by the will, and gives it to the after-born son, and in lieu thereof specifically devised another tract of land to the daughter. He had, as is said in codicil by his will made devises to all of his children. He had specifically devised to each a tract or tracts of land, as he was then doing for his younger son, born after the making of the will, and to such specific devises alone the language of the codicil may be referred. It was these he manifestly had in mind, and to which his attention was attracted, in making like provision for his other and

after-born child. We are of opinion that the provisions of this will clearly evince an intention to exclude appellant from participation in any residue of his estate, and that the appellate court held correctly in excluding him from participating therein. The judgment of the appellate court affirming the decree of the circuit court is affirmed.

THE LIABILITY OF ADMINISTRATORS AND EXECUTORS

DICKINSON V. CALAHAN'S ADMINISTRATION

19 Pennsylvania State, 227 (1892)

Two suits were brought by J. H. Woodruff and D. E. Calahan, administrators of the estate of William Calahan, deceased, against Samuel Dickinson, executor of the will of D. B. R. Dickinson, deceased; the one in covenant, and the other in assumpsit, for the same cause of action—viz., to recover the value of 136,678 feet of pine lumber, at \$6 per thousand, and interest thereon from April 10th, 1842.

LOWRIE, J. The one party, a lumber manufacturer, agreed to sell to the other, a lumber merchant, all the lumber to be sawed at his mill during five years, and that the quantity should be equal on an average to 300,000 feet in a year, without stipulating for any given quantity in any one year, and the lumber was to be paid for as delivered. Before the five years had expired both parties died, and now the representatives of the vendee seek to hold those of the vendor bound to perform the contract, and to set off damages for the breach of it against a claim for part of the lumber delivered.

The point in controversy may be stated thus: Where a lumber manufacturer contracts with a lumber merchant to sell him a certain quantity of lumber, to be made at his mill during five years, for which he is to be paid as the lumber is delivered, and he dies before the time has elapsed, are his administrators bound to fulfil the contract for the remainder of the time?

No one can trace up this branch of the law very far without becoming entangled in a thicket from which he will have difficulty in extricating himself. Very much of the embarrassment arises from the fact that the liability of executors and administrators has been often made to depend more upon the forms of action than upon the essential relations of the parties, as will be seen by reference to the books: Platt on Covenants, 453; 2 Wms. Executors, 1060; Viner's Ab. titles "Covenants" D. E., and "Executor" H. a.; Touchstone, 178. The simplicity and symmetry of the law would certainly be greatly increased, and its justice better appreciated if in all cases where the law undertakes the administration

of estates, as in cases of insolvency, bankruptcy, lunacy, and death the rules of distribution were the same.

The contract in this case established a defined relation, a relation depending for its origin and extent upon the intention of the parties. The question is, Do the administrators of a deceased party succeed to that relation after the death of the party, or was it dissolved by that event? On this question the books give us an uncertain light. In *Hyde v. Windsor*, Cro. Eliz. 552, it is said that an agreement to be performed by the person of the testator, and which his executor cannot perform, does not survive. But here the uncertainty remains, for the acts which an executor cannot perform are undefined. It recognizes the principle, however, that an executor does not fully succeed to the contract relations of his testator.

The case of *Robson v. Drummond*, 2 Barn. & Ald. 303, 22 Engl. C. L. Rep. 81, is more specific, for in that case it was held that an agreement by a coachmaker to furnish a carriage for five years and keep it in repair was personal, and could not be assigned, and executors and administrators are assigns in law (Hob. 9; Cro. Eliz. 757; Latch, 261; Wentw. Executors, 100); that being a general term, applying to almost all owners of property or claims, whether their title be derived by act of law or of the parties. And it is no objection that one may take as executor or administrator in certain cases where the English laws of maintenance and forms of action would not allow him to take as assignee in fact, for those laws do not extend to such a case, and they have no application here.

In *Quick v. Ludborrow*, 3 Bulst. 29, it is said that executors are bound to perform their testator's contract to build a house; but the contrary is said in *Wntw. Executors*, 124, Vin. Ab., "Covenant," E. pl. 12, to have been declared in *Hyde v. Windsor*, though we do not find it in the regular reports of the case. 5 Co. 24; Cro. Eliz. 552. But these are both mere dicta. The same principle is repeated in *Touchstone*, 178, yet even there a lessee's agreement to repair is not so construed, and in *Latch Rep.* 261, the liability of executors on a contract to build is for a breach in the testator's lifetime. In *Cook v. Colcroft*, 2 Bl. Rep. 856, a covenant not to exercise a particular trade was held to establish a mere personal relation and not to bind executors, and the contrary is held in *Hill v. Hawes*, Vin. Ab. title "Executors," Y. pl. 4. And so executors and administrators stand on the same footing with assignees in fact with regard to apprentices, and contracts of this nature are held not to pass to either, because they constitute a mere personal relation, and are, therefore, not transferable. 2 Stra. 1266; 4 Ser. & R. 109; 1 M. 172; 19 Johns. 113; 1 Rob. 519; 12 M. 553, 650; 5 Co. 97.

The case most nearly resembling this is *Wentworth v. Cock*, 10 Ad. & El. 42, 37 Eng. C. L. R. 33, where a contract to deliver a certain

quantity of slate, at stated periods, was held to bind the executors. This case was decided without deliberation, and with but little argument on the part of the executors. The plaintiff relied on the case of *Walker v. Hull*, 1 Lev. 177, where executors were held bound to supply the place of the testator in teaching an apprentice his trade. But that case had long ago been denied in England (2 Stra. 1266), and is rejected here. *Commonwealth v. King*, 4 Ser. & R. 109. This last case treats the contract as a mere personal one, that is dissolved by death, and regards as absurd the doctrine in *Wadsworth v. Gay*, 1 Keb. 820, and 1 Sid. 216, that the executors are bound to maintain the apprentice while he is discharged from duty.

Our statute recognized the duty of the executor and administrator to pay all debts owing by the deceased at the time of his death, and this is the common principle. In another clause it makes the executor and administrator liable to be sued in any action, except for libels and slanders and wrongs done to the person, which might have been maintained against the decedent if he had lived. But this furnishes us no aid in this case, and was not intended to. Its purpose is to enlarge and define the rights of action which, existing against the individual, should survive against his estate. Not contract relations and duties, but remedies for injuries already done are declared to survive. If the decedent committed no breach of contract he was liable to no action when he died, and this law cannot apply.

We are then without any well-defined rule of law directly applicable to this case, and are therefore under the necessity of deducing the rule for ourselves. The elements from which this deduction is to be made are the contract itself, the ordinary principles and experience of human conduct, the decisions in analogous cases, and the nature of the office of administrator.

We repeat the question, Does such a contract establish anything more than a personal relation between the parties? This is a mere question of construction depending upon the intention of the parties (*Hob. 9; Yelv. 9; Cro. Jac. 282; 1 Bing. 225, 8 Eng. C. L. R. 307*) unless the intention be such as the law will not enforce. Is it probable that either party intended to bind his executors or administrators to such a relation? The contract does not say so, and we think it did not mean it, for it would involve the intention that the administrators of one shall be lumber merchants and those of the other sawyers. The character of the contract demands not such a construction, for each delivery under it is necessarily of complete and independent articles, and each delivery was to be at once a finished work on each side. There may be cases when it is necessary that the executor or administrator shall complete a work already begun by the decedent, and then they may recover

